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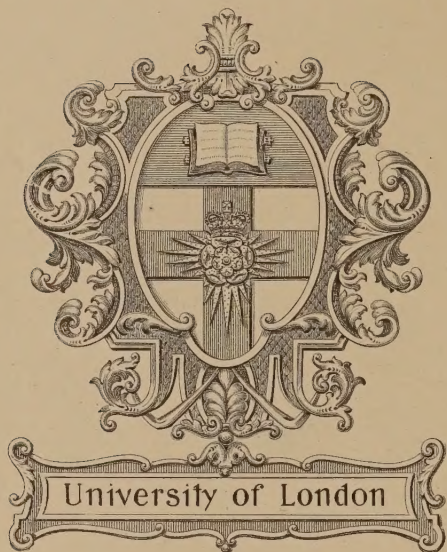
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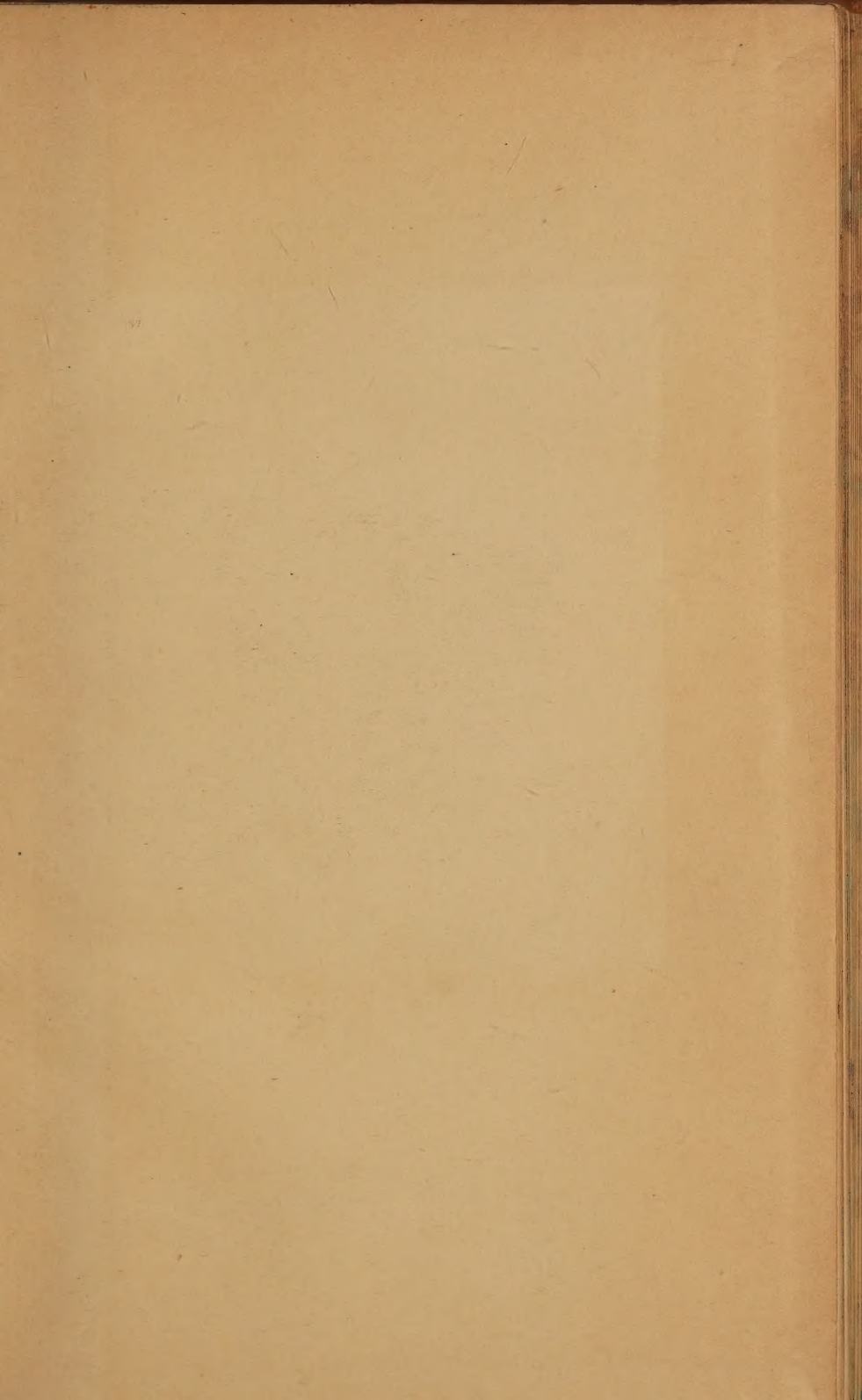
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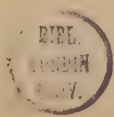
BY
ARTHUR WILSON,
BARRISTER-AT-LAW.

EDITED BY
JAMES REDFOORD BULWER, Q.C.

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XXXV VICTORIA.

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JUDGES
OF
THE COURT OF QUEEN'S BENCH.

XXXV VICTORIA.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.	PAGE		PAGE
A'Beckett, Jenner <i>v.</i>	11	Cherry, Thompson <i>v.</i>	573
Abrahams, Wells <i>v.</i>	554	Christoffersen <i>v.</i> Hansen	509
Akroyd, Barnes <i>v.</i>	474	Clarke, Fox <i>v.</i>	748
Armitage, Reg. <i>v.</i>	773	Coates <i>v.</i> Collins	144
Armstrong <i>v.</i> Stokes	598	Cohen, Thompson <i>v.</i>	527
Articled Clerk, Ex parte	287	Cole <i>v.</i> Kernot	534, n.
Atherton, Dennett <i>v.</i>	316	Collins, Coates <i>v.</i>	144
		Colt's Patent Firearms Com- pany, Newby <i>v.</i>	293
		Cook <i>v.</i> Montagu	418
B.		Core <i>v.</i> James	135
Bailey <i>v.</i> Finch	34	Cory <i>v.</i> Patton	304
Barnes <i>v.</i> Akroyd	474	Cullen <i>v.</i> Trimble	416
Barnes, Norris <i>v.</i>	537	Cuthbertson, Jones <i>v.</i>	218
Batut <i>v.</i> Hartley	594		
Bell, Receiver for the Metropo- litan Police District <i>v.</i>	433	D.	
Birmingham Canal Company, Dunn <i>v.</i>	244	Darby, Smith <i>v.</i>	716
Birmingham (Justices of), Simpkin <i>v.</i>	482	Davies <i>v.</i> Solomon	112
Bishop, Great Western Railway Company <i>v.</i>	550	Dennett <i>v.</i> Atherton	316
Bolton (Mayor of), Wilson <i>v.</i>	105	Driffeld, Ex parte	207
Borwick, Threfall <i>v.</i>	711	Dunn <i>v.</i> Birmingham Canal Company	244
Brown <i>v.</i> Nugent	588		
		E.	
C.		East Dean (Overseers of), Guest <i>v.</i>	334
Casswell, Reg. <i>v.</i>	328	Easton <i>v.</i> Richmond Highway Board	69
Caudwell <i>v.</i> Hanson	55	Elliott <i>v.</i> Majendie	429
		Everingham <i>v.</i> Ivatt	683

F.		PAGE	
	PAGE		
Farnham <i>v.</i> Stimson	175	Henderson, Notara <i>v.</i>	225
Fearon <i>v.</i> Mitchell	690	Holland, In re	297
Feast, White <i>v.</i>	353	Hollins, Fowler <i>v.</i>	616
Fedden, Ross <i>v.</i>	661	Holt <i>v.</i> Gaslight and Coke Com- pany	728
Fell <i>v.</i> Whittaker	120	I.	
Fenner <i>v.</i> The London and South Eastern Railway Company	767	Ionides <i>v.</i> Pacific Insurance Company	517
Finch, Bailey <i>v.</i>	34	Ivatt, Everingham <i>v.</i>	683
Fitzhardinge <i>v.</i> Gloucester and Berkeley Canal Company	776	J.	
Fleet <i>v.</i> Murton	126	Jacobs, St. Mary, Newington <i>v.</i>	47
Fleming, Lloyd <i>v.</i>	299	James, Core <i>v.</i>	135
Forrest, Wallen <i>v.</i>	239	Jay, Wulff <i>v.</i>	756
Foundling Hospital, Reg. <i>v.</i>	83	Jenkin <i>v.</i> King	478
Fowler <i>v.</i> Hollins	616	Jenner <i>v.</i> A'Beckett	11
Fox <i>v.</i> Clarke	748	Jones <i>v.</i> Cuthbertson	218
Foxall, Phillips <i>v.</i>	666	— <i>v.</i> Harris	157
Fraser <i>v.</i> The Telegraph Con- struction Company	566	— <i>v.</i> Neptune Marine In- surance Company	702
Friendly Societies (Registrar of), Reg. <i>v.</i>	741	Joyce <i>v.</i> Kennard	78
G.		— <i>v.</i> The Realm Insurance Company	580
Gainsborough Union, Reg. <i>v.</i>	64	Justices of Middlesex, Reg. <i>v.</i>	653
Gaslight and Coke Company, Holt <i>v.</i>	728	K.	
Geipel <i>v.</i> Smith	404	Kennard, Joyce <i>v.</i>	78
Gloucester and Berkeley Canal Company, Fitzhardinge <i>v.</i>	776	Kernot, Cole <i>v.</i>	534, n.
Glynn, Reg. <i>v.</i>	16	King, Jenkin <i>v.</i>	478
Grant <i>v.</i> Shaw	700	Kitching, Martineau <i>v.</i>	436
Graves, Mercer <i>v.</i>	499	L.	
Great Northern Railway Com- pany, Pearson <i>v.</i>	785, n.	Lakeman, Mountstephen <i>v.</i>	197
Great Western Railway Com- pany <i>v.</i> Bishop	550	Lear, Williams <i>v.</i>	285
— May <i>v.</i>	364	Liverpool (Overseers of), The Mersey Docks <i>v.</i>	643
Guest <i>v.</i> Overseers of East Dean	334	Lloyd <i>v.</i> Fleming	299
H.		— <i>v.</i> Spence	299
Hannaford <i>v.</i> Hannaford	116	London, Brighton, and South Coast Railway Company,	
Hansen, Christoffersen <i>v.</i>	509	Stoneham <i>v.</i>	1
Hanson, Caudwell <i>v.</i>	55	London and South Eastern Railway Company, Fenner <i>v.</i>	767
Harrald, Reg. <i>v.</i>	361	Lords Commissioners of the Treasury, Reg. <i>v.</i>	387
Harris, Jones <i>v.</i>	157		
Hartley, Batut <i>v.</i>	594		

M.	PAGE	R.	PAGE
Majendie, Elliott <i>v.</i>	429	Realm Insurance Company,	
Marshall <i>v.</i> Ulleswater Steam		Joyce <i>v.</i>	580
Navigation Company	166	Receiver for the Metropolitan	
Martineau <i>v.</i> Kitching	436	Police District <i>v.</i> Bell	433
May <i>v.</i> Great Western Railway		Reg. <i>v.</i> Armitage	773
Company	364	— <i>v.</i> Casswell	328
Mercer <i>v.</i> Graves	499	— <i>v.</i> Foundling Hospital	83
Mersey Docks <i>v.</i> Overseers of		— <i>v.</i> Gainsborough Union	64
Liverpool	643	— <i>v.</i> Glynne	16
Michael, Ex parte	658	— <i>v.</i> Harrald	361
Middlesex, Justices of, Reg. <i>v.</i>	653	— <i>v.</i> Justices of Middlesex	653
Mitchell, Fearon <i>v.</i>	690	— <i>v.</i> Justices of Staffordshire	288
Molesworth, Ex parte	209	— <i>v.</i> Lords Commissioners	
Montagu, Cook <i>v.</i>	418	of the Treasury	387
Morgan, Reg. <i>v.</i>	26	— <i>v.</i> Morgan	26
— <i>v.</i> Rowlands	493	— <i>v.</i> Rowell	490
— <i>v.</i> Steble	611	— <i>v.</i> St. George's Union	90
Mountstephen <i>v.</i> Lakeman	197	— <i>v.</i> St. Ive's Union	467
Murton, Fleet <i>v.</i>	126	— <i>v.</i> St. Luke's	148
Myers, Smith <i>v.</i>	139	— <i>v.</i> Strachan	463
		— <i>v.</i> Taylor	487
N.		— <i>v.</i> The Registrar of Friendly	
Neptune Marine Insurance		Societies	741
Company, Jones <i>v.</i>	702	— <i>v.</i> Vice-Chancellor of Ox-	
Newberry, Wilson <i>v.</i>	31	ford	471
Newby <i>v.</i> Colt's Patent Fire-		— <i>v.</i> Waterhouse	545
arms Company	293	Richmond Highway Board,	
Norris <i>v.</i> Barnes	537	Easton <i>v.</i>	69
Northbrook, Lord <i>v.</i> Plumstead		Ross <i>v.</i> Fedden	661
Board of Works	183	Rowell, Reg. <i>v.</i>	490
Notara <i>v.</i> Henderson	225	Rowlands, Morgan <i>v.</i>	493
Nugent, Brown <i>v.</i>	588		
P.		S.	
Pacific Insurance Company,		Shaw, Grant <i>v.</i>	700
Ionides <i>v.</i>	517	Simpkin <i>v.</i> Justices of Birming-	
Patton, Cory <i>v.</i>	304	ham	482
Pearson <i>v.</i> Great Northern Rail-		Simpson <i>v.</i> Wells	214
way Company	785, n.	Skinner <i>v.</i> Usher	423
Phillips <i>v.</i> Foxall	666	Smith <i>v.</i> Darby	716
Plumstead Board of Works,		—, Geipel <i>v.</i>	404
Lord Northbrook <i>v.</i>	183	— <i>v.</i> Myers	139
— — — — — Pound <i>v.</i>	183	Solomon, Davies <i>v.</i>	112
Portbury, Toleman <i>v.</i>	344	Spence, Lloyd <i>v.</i>	299
Pound <i>v.</i> Plumstead Board of		Staffordshire (Justices of),	
Works	183	Reg. <i>v.</i>	288
		Steble, Morgan <i>v.</i>	611

	PAGE		PAGE
Stimson <i>v.</i> Farnham	175	U.	
St. George's Union, Reg. <i>v.</i>	90	Ulleswater Steam Navigation	
— Ive's Union, Reg. <i>v.</i>	467	Company, Marshall <i>v.</i>	166
— Luke's, Reg. <i>v.</i>	148	Usher, Skinner <i>v.</i>	423
— Mary, Newington <i>v.</i> Jacobs	47		
Stokes, Armstrong <i>v.</i>	598	V.	
Stoneham <i>v.</i> The London Brighton,		Vice-Chancellor of Oxford,	
and South Coast Rail-		Reg. <i>v.</i>	471
way Company	1		
Strachan, Reg. <i>v.</i>	463	W.	
Sweeting <i>v.</i> Turner	310		
		Wallen <i>v.</i> Forrestt	239
T.		Waterhouse, Reg. <i>v.</i>	545
Taylor, Reg. <i>v.</i>	487	Webley <i>v.</i> Woolley	61
Telegraph Construction Com-	566	Wells <i>v.</i> Abrahams	554
pany, Fraser <i>v.</i>		—— Simpson <i>v.</i>	214
Thompson, Cherry <i>v.</i>	573	White <i>v.</i> Feast	353
—— <i>v.</i> Cohen	527	Whittaker, Fell <i>v.</i>	120
Threfall <i>v.</i> Borwick	711	Williams <i>v.</i> Lear	285
Toleman <i>v.</i> Portbury	344	Wilson <i>v.</i> Mayor of Bolton	105
Trimble, Cullen <i>v.</i>	416	—— <i>v.</i> Newberry	31
Turner, Sweeting <i>v.</i>	310	Woolley, Webley <i>v.</i>	61
		Wulff <i>v.</i> Jay	756

TABLE OF CASES CITED.

A.

	PAGE
Abbot <i>v.</i> Blofield	Cro. Jac. 644 219
Addison <i>v.</i> Gandassequi	4 Taunt. 575, 577 606
Alexander <i>v.</i> Gardner	1 Bing. N. C. 671 455
Allen <i>v.</i> Smith	12 C. B. (N.S.) 638 713
— <i>v.</i> Thompson	1 H. & N. 15 159, 701
— <i>v.</i> Tunbridge	Law Rep. 6 C. P. 481 425
— <i>v.</i> Worthy	Law Rep. 5 Q. B. 163 547
Allhusen <i>v.</i> Malgarejo	Law Rep. 3 Q. B. 340 574, 575, 576
Andrews <i>v.</i> Palmer	4 B. & Ald. 250 536
Anonymous Case	1 Vent. 59 17
Anonymous	1 Mod. 215 44
Ashby <i>v.</i> White	1 Sm. L. C. 255, 267, 6th ed. 556
Ashworth <i>v.</i> Heyworth	Law Rep. 4 Q. B. 316 693
Atkinson <i>v.</i> Ritchie	10 East. 530 407
Attenborough <i>v.</i> Thompson	2 H. & N. 559 701
Avery <i>v.</i> Bowden	5 E. & B. 714 408

B.

Badger <i>v.</i> Shaw	2 E. & E. 472 760
Bagnall <i>v.</i> London and North Western Railway Company	7 H. & N. 423; 1 H. & C. 544 267
Bailey <i>v.</i> De Crespigny	Law Rep. 4 Q. B. at p. 180, 185 409
— <i>v.</i> Edwards	4 B. & S. 770 680
Baker <i>v.</i> London and South Western Railway Company	Law Rep. 3 Q. B. 91 771
Baldwin <i>v.</i> Cole	6 Mod. 212 621
Bamfield <i>v.</i> Tupper	7 Ex. 27 496
Banker's Case, The	14 How. St. Tr. 67 391
Bannister <i>v.</i> Breslauer	Law Rep. 2 C. P. 497 510, 511, 514
Barber <i>v.</i> Nottingham and Grantham Railway Company	15 C. B. (N.S.) 726 267, 269
Barker <i>v.</i> St. Quintin	12 M. & W. 441 502, 505
Barnsley <i>v.</i> Taylor	37 L. J. (Q.B.) 39 496
Baron de Bode, Re	6 Dowl. 776 390
Barton <i>v.</i> Fitzgerald	15 East. at p. 541 146
Bath, Earl of <i>v.</i> Abney	1 Ken. 471; 1 Burr. 206 688
Batteley <i>v.</i> Stainsby	Law Rep. 2 C. P. 568 536
Bayley, Ex parte	9 B. & C. 691 298
Beckham <i>v.</i> Drake	2 H. L. C. 579, 597, 642 613
Beckett <i>v.</i> West of England Marine Insurance Company	25 L. T. (N.S.) 739 705

	PAGE
Bell <i>v.</i> Hobson	16 East. 240 . 582, 583, 585, 586
Berkley <i>v.</i> Shafto	15 C. B. (N.S.) 79, 92. . 721
Bidgood <i>v.</i> Way	2 W. Bl. 1236 . . 219
Bird <i>v.</i> Brown	4 Ex. 786 . . 620
— <i>v.</i> Cromwell	1 Misso. 81 . . 226
— <i>v.</i> Great Eastern Railway Company .	19 C. B. (N.S.) 268 . . 734
— <i>v.</i> Peagram	13 C. B. 639 . . 219
Birkmyr <i>v.</i> Darnell]	1 Sm. L. C. 274 (6th ed.) . 199
Bishop <i>v.</i> Church	1 Salk. 27 . . 200, 202, 204
Black <i>v.</i> Ottoman Bank	3 Atk. 691 . . 36
Blackburne <i>v.</i> Graves	15 Moo. P. C. 472 . . 670, 760
Blackwell <i>v.</i> England	1 Mod. 120 . . 689
Blasco <i>v.</i> Fletcher	8 E. & B. 541 . . 701
Bodenham <i>v.</i> Hoskins	14 C. B. (N.S.) 147 . . 226
Bolton <i>v.</i> Corporation of Liverpool .	2 De G. M. & G. 903; 21 L. J. (Ch.) 864 . . 38
Bond <i>v.</i> St. George, Hanover Square .	1 My. & K. 88, 92 . . 241
Bostock <i>v.</i> Jardine	Law Rep. 6 C. P., at p. 314 . 473
Bottomley <i>v.</i> Brooke	3 H. & C. 700 . . 599
Bourne <i>v.</i> Fosbrooke	M 22 Geo. 3, C. B., given in 1 T. R. at p. 621 . . 38
Bowditch <i>v.</i> Wakefield Board of Works .	18 C. B. (N.S.) 515 . . 122
Brands <i>v.</i> Bowlby	Law Rep. 6 Q. B. 567 . . 195
Brashear <i>v.</i> Mason	2 B. & Ad. 932 . . 595
Brewer <i>v.</i> Drew	6 Howard, 92 . . 391
Briggs <i>v.</i> Boss	11 M. & W. 625 . . 613
Bristowe <i>v.</i> Needham	Law Rep. 3 Q. B. 268 . 158, 163, 701
Broadwood <i>v.</i> Granara	7 Man. & G. 648 . . 502
Brodrick <i>v.</i> Scale	10 Ex. 417 . . 713, 714
Brown <i>v.</i> Nugent	Law Rep. 6 C. P. 98, at p. 103 160, 162
— <i>v.</i> Turner	Law Rep. 6 Q. B. 693 . . 588
Brown's Case	13 C. B. (N.S.) 485 . . 480
Bruen <i>v.</i> Roe	4 Rep. 22 b, note (D. 1) by Thomas . . 683, 685
Brunsdon <i>v.</i> Allard	Sid. 264 . . 627
Bryant <i>v.</i> Beattie	2 E. & E. 19 . . 505, 506
—, Ex parte	4 Bing. N. C. 254 . . 489
Buccleuch, Duke of, <i>v.</i> Metropolitan Board of Works	2 Rose, 237 . . 503
Burgess <i>v.</i> Eve	Law Rep. 5 Ex. 221; Law Rep. 5 H. L. 418 . . 737
Burroughes <i>v.</i> Bayne	Law Rep. 13 Eq. 450, 458 677, 680
Butler <i>v.</i> Swinnerton	5 H. & N. 296 . . 629, 631
	Palm. 339; Cro. Jac. 656 321, 322

C.

Calder <i>v.</i> Dobell	Law Rep. 6 C. P. 486 . . 128, 131
Calthorp <i>v.</i> Heyton	2 Mood. 54 . . 326
Calvert <i>v.</i> Sebright	15 Beav. 156 . . 322
Calye's Case	8 Rep. 32 a, at f. 33 a . 714, 715
Campbell <i>v.</i> Spottiswoode	3 B. & S. 769 . . 12
Capel <i>v.</i> Butler	2 S. & S. 457 . . 760
Carpenter <i>v.</i> Parker	3 C. B. (N.S.) 206 . . 323
Carr <i>v.</i> Acraman	11 Ex. 566 . . 531, 536
— <i>v.</i> Montefiore	5 B. & S. at p. 422 . . 582
Carron Iron Company <i>v.</i> Maclaren . . .	5 H. L. C. 416 . . 295

		PAGE
Carstairs v. Taylor	Law Rep. 6 Ex. 217	663, 664, 666
Case v. Story	Law Rep. 4 Ex. 319	425, 426
Castle v. Playford	Law Rep. 7 Ex. 98	447, 451, 455
Chapman v. Derby	2 Vern. 117	44
—— v. Robinson	1 E. & E. 25	72, 74, 75, 76
Charleston Steamboat Company v. Bason	Harper, 262	226
Chartered Bank of India v. Rich	4 B. & S. 73	771
Chauntler v. Robinson	4 Ex. 163	665
Cheesman v. Exall	6 Ex. 341	595
Cherry v. Colonial Bank of Australasia	Law Rep. 3 P. C. 24	200
Church v. Mundy	12 Ves. 426, 431	683
City of Glasgow Union Railway Company } v. Caledonian Railway Company	Law Rep. 2 H. L. Sc. 160	373, 382
Clarke v. Stanford	Law Rep. 6 Q. B. 357	425, 426, 428
Cleland, Ex parte	Law Rep. 2 Ch. App. 808	499, 502
Clerk v. Withers		505, 507, 508
Cole v. Kernot	2 Ld. Raym. at p. 1075	177, 179, 181
Collen v. Wright	Law Rep. 7 Q. B. 534	533
Colman v. Trueman	8 E. & B. 647	200, 201
Compton v. Earl Grey	3 H. & N. 871	771
Cook v. Gerrard	1 Y. & J. 154	241
—— v. Humber	1 Wms. Saund. 185	116
Cooper v. Jones	11 C. B. (N.S.) 33	96
Cory v. Patton	3 B. & A. 425	116
Couturier v. Hastie	Law Rep. 7 Q. B. 304	523
Cramer v. Mott	8 Ex. 40, 56	182, 200
Cranch v. White	Law Rep. 5 Q. B. 357	712
Crauford v. Cinnamond	1 Bing. N. C. 414	621
Cripps v. Hartnoll	Ir. L. Rep. 1 C. L. 325	615
Crosby v. Leng	4 B. & S. 414	200
Crowley v. Cohen	12 East, 409	556
Cuming v. Brown	3 B. & Ad. 478	81, 82
Cunliffe, Ex parte	9 East, 506	595
Curson v. African Company	15 L. J. (Q.B.) 41	588
	1 Vern. 121	44, n.

D.

Davies v. Edwards	7 Ex. 22	496, 498
Davis v. Shapley	1 B. & Ad. 54	536
Dawkes v. Coveleigh	Sty. 346	556, 561
Decatur v. Paulding	14 Peters, 497	391
De Cuadra v. Swann	16 C. B. (N.S.) 772	235
Dell v. Higden	Moore, 358, cited in Coke's Law Tracts, by Hawkins, p. 162	683
Dixon v. Yates	5 B. & Ad. 313	312
Doe d. Armitstead v. North Staffordshire } Railway Company	16 Q. B. 526	374, 386
—— v. Jenney	5 East, 522	683
—— v. Lawes	7 A. & E. at p. 210	683
Dovaston v. Payne	2 H. Bl. 527	54
Dowse, The	Law Rep. 3 A. & E. 135	659
Dudley Canal Company v. Grazebrook	1 B. & Ad. 59	256, 264, 272, 276, 277
Dugdale v. Robertson	3 K. & J. 695	721
Durham, Earl of, v. Bishopwearmouth	2 E. & E. 230	330
—— v. Spence	Law Rep. 6 Ex. 46	576
Dutch West India Company v. Van Moses	1 Str. 612	294

E.

		PAGE
Eastern Counties Railway Company <i>v.</i> {	5 C. B. (N.S.) 821	171, 173, 175
Dorling		
Eddleston <i>v.</i> Francis	7 C. B. (N.S.) 568	108
Eisdell <i>v.</i> Coningham	28 L. J. (Ex.) 213	502
Elizabeth, The	1 Edw. 198	408
Elliott <i>v.</i> Kemp	7 M. & W. 306	37
Ellis <i>v.</i> Grey	6 Sim. at p. 220	391
Elwood <i>v.</i> Bullock	6 Q. B. 383, at p. 409	73, 215, 216
Ely, Dean of, <i>v.</i> Caldecot	8 Bing. 439, at p. 433	685, 686, 688
Evans <i>v.</i> Botterill	3 B. & S. 787	480
— <i>v.</i> Harlow	5 Q. B. 624	12
— <i>v.</i> Oakley	1 C. & K. 125	72, 73, 74, 76
Evelyn <i>v.</i> Whichcord	E. B. & E. 126	58
Everard <i>v.</i> Kendall	Law Rep. 5 C. P. 428	659
Ewbank <i>v.</i> Nutting	7 C. B. 797	226, 236
Exall <i>v.</i> Partridge	8 T. R. 308	122

F.

Fairlie <i>v.</i> Fenton	Law Rep. 5 Ex. 169	128, 129, 131
Falkner <i>v.</i> Earle	3 B. & S. 360	128
Farr <i>v.</i> Newman	4 T. R. 621	37
Farrer <i>v.</i> Close	Law Rep. 4 Q. B. 602	745
Ferrar <i>v.</i> London Commissioners of Sewers {	Law Rep. 4 Ex. at pp. 229, 230,	
	231	150
Field <i>v.</i> Smith	2 M. & W. 388	178
Finney <i>v.</i> Forward	3 L. J. (Ex.) at p. 44	240, 243
Fleet <i>v.</i> Perrins	Law Rep. 3 Q. B. 536; Law	
	Rep. 4 Q. B. 500	219, 220
Fletcher <i>v.</i> Great Western Railway Com- {	4 H. & N. 242; in error, 5 H.	
pany	& N. 689	266
	Law Rep. 1 Ex. 265; Law Rep.	
Fletcher <i>v.</i> Rylands	3 H. L. 330	32, 33, 258, 259,
	260, 267, 269, 271, 274, 284	
Flitcroft <i>v.</i> Fletcher	11 Ex. 543	240, 241, 243
Foley <i>v.</i> United Fire Insurance Company	Law Rep. 5 C. P. 155	704
Forster <i>v.</i> Wilson	12 M. & W. 191, at p. 204	38, 45, 502
Foster <i>v.</i> Bates	12 M. & W. 226	620
— <i>v.</i> Dawber	6 Ex. 839	498
Fouldes <i>v.</i> Willoughby	8 M. & W. 540	629, 632
Frank <i>v.</i> Edwards	8 Ex. 214	670
Freeman <i>v.</i> Cooke	2 Ex. 654	180
— <i>v.</i> Lomas	9 Hare, 109, 114	36
French <i>v.</i> Phillips	1 H. & N. 564	121
Frost <i>v.</i> Knight	Law Rep. 7 Ex. 111	574, 579

G.

Gale <i>v.</i> Luttrell	1 Y. & J. 180	38
Garland <i>v.</i> Mead	Law Rep. 6 Q. B. 441	685
General Steam Navigation Company <i>v.</i> {	11 M. & W. 877	294
Guillon		
Gerring <i>v.</i> Barfield	16 C. B. (N. S.) 597	216
Gidley <i>v.</i> Lord Palmerston	3 B. & B. 275	391

	PAGE
Gilmour v. Supple	11 Moo. P. C. 551, 567 446
Gimson v. Woodfull	2 C. & P. 41 557, 559, 562
Glass v. Richardson	2 D. M. & G. at p. 662 686
Glover v. North Staffordshire Railway Company	16 Q. B. 912 6
Glynn v. Thomas	11 Ex. 870 122, 123, 124
Goodman v. Chase	1 B. & Ald. 297 200
Gordon v. Calvert	2 Sim. 253 270
Gould v. Staffordshire Potteries Water-works Company	5 Ex. 214 779
Gratitude, The	3 Rob. Adm. 240, 259 226
Gray v. Carr	Law Rep. 6 Q. B. at pp. 536, 546 510, 515
Great Western Railway Company v. Bennett	Law Rep. 2 H. L. 27, 39 266, 277
Green v. Cresswell	10 A. & E. 453 200
Greenlaw v. King	1 Beav. 137, at p. 143 769, 771
Greenway v. Fisher	1 C. & P. 190 620, 621, 628, 632, 639
Grill v. General Iron Screw Collier Company	Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476 236
Gugen v. Sampson	4 F. & F. 974 701
Guildford Union v. St. Olave's Union	25 L. T. (N.S.) 803 469
Gulliver v. Cosens	1 C. B. 788 122
Gurney v. Behrend	2 E. & B. 622 595
Gursey v. Sanderson	Scriven on Copyholds, 5th ed., pp. 202, 213 683
Gyppen v. Bunney	Cro. Eliz. 504 687

H.

Hadley v. Clarke	8 T. R. 259 407, 408, 414
Hall v. Molineaux	6 East, at p. 385 523, 525
Hamilton v. Watson	12 Cl. & F. 109 673
Hand, Re	4 A. & E. 984 390
Hanson v. Meyer	6 East, 614 446
Hardman v. Booth	1 H. & C. 803 620, 621
Hargreaves v. Parsons	13 M. & W. 561, 570 200
Harris v. Huntbach	1 Burr. 373 199
—— v. Ryding	5 M. & W. 60 721, 722
—— v. Shaw	Cas. t. Hardw. 349 557
Harrison, Ex parte	16 Jur. 726; 19 L. T. 114 18, 21, 23
Hatton v. English	7 E. & B. 94 159
Hayward v. Metropolitan Railway Company	4 B. & S. 787 780
Heald v. Carey	11 C. B. 977 621
—— v. Kenworthy	10 Ex. 739 609
Helen, The	Law Rep. 1 A. & E. 1 406
Henderson v. Henderson	3 Hare, at p. 115 495
Henrette v. Booth	15 C. B. (N.S.) 500 96
Henriques v. Dutch West India Company	2 Ld. Raym. 1532 294
Hewer v. Cox	3 E. & E. 428, at p. 436 158, 163, 701
Heydon's Case	3 Rep. on f. 7 b. 76
Higgins v. Butcher	Yelv. 89 561
—— v. Senior	8 M. & W. 834, at p. 844 128, 131, 607
Higsons v. Burton	26 L. J. (Ex.) 342 621
Hills v. Sughrue	15 M. & W. 253 407, 408
Hinde v. Whitehouse	7 East, 558 313
Hirst v. Halifax Board of Health	Law Rep. 6 Q. B. 181 191

	PAGE
Hobson <i>v.</i> Middleton	6 B. & C. 295, 303 . . . 348, 351
Hochster <i>v.</i> De la Tour	2 E. & B. 678 . . . 408
Hodges <i>v.</i> Bennett	5 H. & N. 625 . . . 774
Hodgson <i>v.</i> Sidney	Law Rep. 1 Ex. 313 . . . 613, 614, 615
Holles <i>v.</i> Carr	{ 3 Swanst., at p. 649; 2 Freem. at p. 4 . . . 146
Hollis <i>v.</i> Palmer	2 Bing. (N.C.), at p. 716 . . . 495
Holroyd <i>v.</i> Marshall	10 H. L. C. 191 . . . 531, 533
Hope <i>v.</i> Hayley	5 E. & B. 830 . . . 536
Hornby <i>v.</i> Close	Law Rep. 2 Q. B. 153 . . . 745
Horsfall <i>v.</i> Fauntleroy	10 B. & C. 755 . . . 599
Hudson <i>v.</i> MacRae	4 B. & S. 585 . . . 357
Hughes <i>v.</i> Smith	Smith & Batty's Ir. Rep. 378 . . . 565
Hull Dock Case	18 Q. B. 325 . . . 643, 649, 650, 651, 652
Humphries <i>v.</i> Brogden	12 Q. B. 739 . . . 664, 721, 722
Humfrey <i>v.</i> Dale	{ 7 E. & B. 266; E. B. & E. 1004, 128, 132, 133, 134
Hunt <i>v.</i> Danvers	T. Raym. 370 . . . 326
Hunter <i>v.</i> Leathley	10 B. & C. 858 . . . 705
Huntley <i>v.</i> Griffith	Moore, 452 . . . 219
Hurd <i>v.</i> Fletcher	Doug. 43 . . . 322, 323

I.

Ingate <i>v.</i> Austrian Lloyd's Company	4 C. B. (N.S.) 704 . . . 294, 295
Ionides <i>v.</i> Pacific Insurance Company	{ Law Rep. 6 Q. B. 674 . . . 305, 307, 308, 309, 310

J.

Jackson <i>v.</i> Cobbin	8 M. & W. 790 . . . 324
—— <i>v.</i> Spittall	{ Raw Rep. 5 C. P. 542 . . . 573, 575, 576, 577
Jacomb <i>v.</i> Dodgson	3 B. & S. 461 . . . 108
Johnson <i>v.</i> Macdonald	9 M. & W. 600 . . . 140
—— <i>v.</i> Upham	2 E. & E. 250 . . . 123, 125
Jones <i>v.</i> Carter	15 M. & W., at p. 726 . . . 349
—— <i>v.</i> Littledale	6 A. & E. 486 . . . 131
Jordan <i>v.</i> Warren Insurance Company	1 Story, U. S. R. 342 . . . 226

K.

Keatè <i>v.</i> Temple	1 B. & P. 158 . . . 200
Kemble <i>v.</i> Atkins	Holt, N. P. 427 . . . 607
Kershaw <i>v.</i> Ogden	3 H. & C. 717 . . . 446
King <i>v.</i> Basingham	8 Mod. 199 . . . 219
—— <i>v.</i> Hoare	13 M. & W. 494 . . . 496
—— <i>v.</i> Shepherd	3 Story, U. S. R. 349 . . . 226
Kingston, Ex parte	Law Rep. 6 Ch. App. 632 . . . 37, 42
Kirkham <i>v.</i> Marter	2 B. & A. 613 . . . 199
Kite, Queinton	4 Rep. 25a. . . . 683
Knibbs <i>v.</i> Hall	1 Esp. 84 . . . 122
Kymer <i>v.</i> Suwercropp	1 Camp. 109 . . . 606, 607

L.

		PAGE
Lade <i>v.</i> Shepherd	2 Str. 1004	54, 170
Lancashire Waggon Company <i>v.</i> Fitzhugh	6 H. & N. 502	627, 630, 636
Lane <i>v.</i> Cotton	1 Salk. 17; Cas. temp. Holt,	582 398
Laurie <i>v.</i> Douglas	15 M. & W. 746	236
Laveroni <i>v.</i> Drury	8 Ex. 166	226
Leader <i>v.</i> Moxon	2 W. Bl. 924	156
Leatt <i>v.</i> Vine	30 L. J. (M.C.) 207	357
Lee <i>v.</i> Bayes	18 C. B. 599	621
— <i>v.</i> Jones	17 C. B. (N.S.) 482, 506, 507	673, 679
Le Mesurier <i>v.</i> Vaughan	6 East, 382	523
Levy <i>v.</i> Hale	29 L. J. (C.P.), 127, at p. 130	177, 179, 182
Livesey <i>v.</i> Harding	1 Russ. & My. 636	116
Llandaff Market Company <i>v.</i> Lyndon	8 C. B. (N.S.) 515	693
Logan <i>v.</i> Le Mesurier	6 Moo. P. C. 116, 127, 133, 134	446, 447
Londesborough, Lord, <i>v.</i> Foster	3 B. & S. 805	683
London Gas Company <i>v.</i> Chelsea	6 C. B. (N.S.) 411	771
London <i>v.</i> Hooper	1 Cowp. 414	122
London and North-Western Railway Company <i>v.</i> Ackroyd	31 L. J. (Ch.) 588	253
Glyn	1 E. & E. 652	446, 457, 458, 462
London, Mayor of, <i>v.</i> St. Sepulchre	Law Rep. 7 Q. B. 333u	330, 331, 332
Lord Beauchamp <i>v.</i> Great Western Railway Company	Law Rep. 3 Ch. App. 745, at p. 750	374
Lord Carington <i>v.</i> Wycombe Railway Company	Law Rep. 2 Ch. App. 377	373
Loring <i>v.</i> Warburton	E. B. & E. 507	123, 125
Lowen <i>v.</i> Kaye	4 B. & C. 3	72
Lucena <i>v.</i> Craufurd	2 B. & P. (N.R.) 269, 300	302
Lund <i>v.</i> Midland Railway Company	34 L. J. (Ch.) 276	375, 385
Lunn <i>v.</i> Thornton	1 C. B. 379	536
Lutterell <i>v.</i> Reynell	1 Mod. 282	557, 563
Lyde <i>v.</i> Mynn	4 Sim. 505; 1 My. & K. 683	527, 528, 529, 532, 533, 536
Lynch <i>v.</i> Knight	9 H. L. C. 577	113, 114
Lynx, Steamboat <i>v.</i> King	12 Misso. 272	226

M.

MacAndrew <i>v.</i> Chappell	Law Rep. 1 C. P. 643	409
Macclesfield, Mayor of, <i>v.</i> Chapman	12 M. & W. 18	696
Mackenzie <i>v.</i> Coulson	Law Rep. 8 Eq. 368	306, 309, 523
Malachy <i>v.</i> Soper	3 Bing. N. C. 371	12
Markham <i>v.</i> Cobb	Sir W. Jones, 147	560, 561
Marshall <i>v.</i> Ulleswater Steam Navigation Co.	3 B. & S. 732	169
Master <i>v.</i> Miller	4 T. R. at p. 332	556
Mayhew <i>v.</i> Crickett	2 Swan. 185	677
McCombie <i>v.</i> Davies	6 East, 538	621
Mead <i>v.</i> Davidson	3 Ad. & E. 303, 308	306
Medeiros <i>v.</i> Hill	8 Bing. 231	408
Medlicot <i>v.</i> Bowes	1 Ves. Sen. 207	38
Mellish <i>v.</i> Allnutt	2 M. & S. 106	705
Metropolitan Ry. Co. <i>v.</i> Turnham	14 C. B. (N.S.) 212	780
Meyerstein <i>v.</i> Barber	Law Rep. 4 H. L. 317	595

	PAGE
Mildmay <i>v.</i> Smith	2 Wms. Saund. 343 177, 179, 181
Miller <i>v.</i> Covert	1 Wend. 487 496
Milvain <i>v.</i> Perez	3 E. & E. 495 511, 514
Mitchell's Case	Law Rep. 6 Ch. App. at p. 828 . . . 497
Mollett <i>v.</i> Robinson	Law Rep. 7 C. P. at p. 119 . . . 605
Moody <i>v.</i> Corbett	Law Rep. 1 Q. B. 510 373, 375, 383, 384
Moore <i>v.</i> Meagher	1 Taunt. 39 113, 114
Mordy <i>v.</i> Jones	4 R. & C. 394 234, 235
Morgan <i>v.</i> Crawshay	Law Rep. 5 H. L. 304 336
——— <i>v.</i> Hunt	2 Vent. 213 326
Mosley <i>v.</i> Walker	7 B. & C. 40 696
Mourilyan <i>v.</i> Labalmondiere	1 E. & E. 533 58

N.

Napier, Ex parte	18 Q. B. at p. 701 391
Naylor <i>v.</i> Taylor	9 B. & C. 718 408
Nelson <i>v.</i> Couch	15 C. B. (N.S.) 99 496
——— <i>v.</i> Whatmore	1 Richardson, 323 630
Newcomb <i>v.</i> De Roos	2 E. & E. 271 574
New Shoreham <i>v.</i> Lancing	Law Rep. 5 Q. B. 489 330
Newton <i>v.</i> Scott	9 M. & W. 434; 10 M. & W. 471 536
Niagara <i>v.</i> Cordes	21 Howard, U. S. R. 7, 28 . . . 226
Noble <i>v.</i> Kennoway	2 Dougl. 510 128, 130, 134
Noke's Case	4 Rep. 80 b. 327
Nonnen <i>v.</i> Kettlewell	16 East, 176; 5 B. & S. 425 . . . 582
Norris <i>v.</i> Barnes	Law Rep. 7 Q. B. 537 478
Northampton, Mayor of, <i>v.</i> Ward	1 Wils. 107 331
North British Insurance Co. <i>v.</i> Lloyd	10 Ex. 523 673
——— <i>v.</i> Moffatt	Law Rep. 7 C. P. 25 446, 457, 462
North Western Ry. Co. <i>v.</i> Whinray	10 Ex. 77 670

O.

Offord <i>v.</i> Davies	12 C. B. (N.S.) 748 670
Ogle <i>v.</i> Atkinson	5 Taunt. 759 595
Oglesby <i>v.</i> Yglesias	E. B. & E. 930 510, 511, 513, 515
Oldham <i>v.</i> Lords of the Treasury	Cited 6 Sim. at p. 220 391

P.

Pain, Ex parte	Law Rep. 3 Ch. App. 639 530
Paine <i>v.</i> Meller	6 Ves. 349, 352 309
Palmer <i>v.</i> Lorillard	16 Johns. U. S. R. 348 226
Paradine <i>v.</i> Jane	Aleyn, 26 408
Pare <i>v.</i> Clegg	29 Beav. 589 745
Pearson <i>v.</i> Great Northern Ry Co.	Law Rep. 7 Q. B. 785 779, 782
——— <i>v.</i> Turner	16 C. B. (N.S.) 157 241, 243
Peckham <i>v.</i> Faria	3 Dougl. 13 200
Pedder <i>v.</i> Preston	12 C. B. (N.S.) 535 37
Pederson <i>v.</i> Lotinga	28 L. T. 267; 5 W. R. 290 510, 511, 512, 514, 515
Peel <i>v.</i> Tatlock	1 B. & P. 419, 423; and see p. 421 . . . 675
Perkins <i>v.</i> Smith	1 Wils. 328 621
Petty <i>v.</i> Cooke	Law Rep. 6 Q. B. 790 760

	PAGE
Philliskirk <i>v.</i> Pluckwell	2 M. & S. 393 220
Pickard <i>v.</i> Bretz	5 H. & N. 9 158, 159, 161
— <i>v.</i> Sears	6 Ad. & E. at p. 474 177, 178, 180
Pillott <i>v.</i> Wilkinson	3 H. & C. 345 621
Pitts <i>v.</i> Smedley	7 M. & G. 85 96
Philpott <i>v.</i> Swann	11 C. B. (N.S.) at p. 281 285
Pole <i>v.</i> Cetcovich	9 C. B. (N.S.) 430 408
Pomfret <i>v.</i> Ricraft	1 Wms. Saund. at p. 121, n. 665
Pooley <i>v.</i> Harradine	7 E. & B. 431 680
Pope <i>v.</i> Whalley	6 B. & S. 303, at p. 311 693, 696
Powel <i>v.</i> Stuff	2 Bulst. 26; 10 Jac. 1 (1612) 44
— <i>v.</i> Howells	Law Rep. 3 Q. B. 654 116
Powles <i>v.</i> Innes	11 M. & W. 10 302
Pridgeon's Case	Cro. Car. 341, 350 17, 22
Purdy <i>v.</i> Smith	1 E. & E. 511 286, 287
Pybus <i>v.</i> Gibb	6 E. & B. 902 670

Q.

Queen Dowager's Case, The	16 Q. B. 357 391, 392, 399
Quinlan <i>v.</i> Barber	Batty's Ir. Rep. 47 565

R.

Railton <i>v.</i> Hodgson	4 Taunt. at p. 576, n. 608
— <i>v.</i> Mathews	10 Cl. & F. 934, 943 672
Read <i>v.</i> Nash	1 Wils. 305 199
Rees <i>v.</i> Berrington	2 Ves. 540, 543; 2 White & Tudor's L. C., 4th ed. at p. 1002 675, 764
Reg. <i>v.</i> Brisby	2 C. & K. 962, 972 20
— <i>v.</i> Buckinghamshire	3 New Sessions Cases, 500; 18 L. J. (M.C.) 113 18, 774
— <i>v.</i> Commissioners of Woods and Forests	15 Q. B. 761 391
— <i>v.</i> Gaunt	Law Rep. 2 Q. B. 466 18, 20, 22
— <i>v.</i> Glossop	Law Rep. 1 Q. B. 227 469, 470
— <i>v.</i> Hall Dare	5 B. & S. 785, 794 66
— <i>v.</i> Harrington	9 L. T. 721; 12 W. R. 420; 3 N. R. 468 18, 19, 23
— <i>v.</i> Hull Dock Co.	18 Q. B. 325 643, 649, 650, 651, 652
— <i>v.</i> Justices of Middlesex	Law Rep. 6 Q. B. 781 484, 485
— <i>v.</i> Justices of Suffolk	2 Q. B. 85 289
— <i>v.</i> Justices of West Riding	Law Rep. 5 Q. B. 33 485
— <i>v.</i> Lancashire Justices	Law Rep. 6 Q. B. 97 492
— <i>v.</i> Leicestershire	15 Q. B. 88 774
— <i>v.</i> Liverpool	15 Q. B. 1070 289
— <i>v.</i> Longton Gas Co.	2 E. & E. 651 51
— <i>v.</i> Machen	14 Q. B. 74 18, 19, 20, 22
— <i>v.</i> Maude	2 Dowl. (N.S.) 58 774
— <i>v.</i> Metropolitan Board of Works	Law Rep. 4 Q. B. 15 337
— <i>v.</i> Middlesex	5 D. & L. 530 774
— <i>v.</i> North and South Shields Ferry Company	1 E. & B. 140 330
— <i>v.</i> Parkinson	Law Rep. 3 Q. B. at p. 12 29
— <i>v.</i> Pearson	Law Rep. 5 Q. B. 237 357
— <i>v.</i> Pratt	4 E. & B. 860, 865 54
— <i>v.</i> Read	9 Atk. 619 774

	PAGE
<i>Reg. v. Rymney Company</i>	Law Rep. 4 Q. B. 276 . . . 330
— <i>v. St. Edmund's, Salisbury</i>	2 Q. B. 72 . . . 289
— <i>v. St. Leonard, Shoreditch</i>	Law Rep. 1 Q. B. 21 . . . 469
— <i>v. Stimpson</i>	4 B. & S. 301 . . . 357
— <i>v. Stourbridge</i>	34 L. J. (M.C.) 179 . . . 469, 470
— <i>v. Tugwell</i>	Law Rep. 3 Q. B. 704, 709 . . . 362
— <i>v. United Kingdom Electric Tele-</i> <i>graph Company</i>	2 B. & S. 647, n. . . 191
— <i>v. Vange</i>	3 Q. B. 242 . . . 66
— <i>v. Weymouth</i>	7 Q. B. 46, at p. 53 . . . 211
<i>Renmett v. Lawrence</i>	15 Q. B. 1004 . . . 177, 178, 181, 182
<i>Rex v. Adames</i>	4 B. & Ad. 61, 68 . . . 66
— <i>v. Bell</i>	5 M. & S. 221 . . . 331, 333
— <i>v. Bilston</i>	5 B. & C. 851; 8 D. & R. at p. 737 . . . 336, 337, 339, 340
— <i>v. Burdett</i>	4 B. & A. 95 . . . 574
— <i>v. Clayton</i>	3 East, 58 . . . 774
— <i>v. Cross</i>	3 Camp. 224 . . . 215
— <i>v. Eve</i>	2 Show. 257 . . . 774
— <i>v. Jenkin</i>	Cas. K. B. t. Hardw, 301 . . . 17, 18, 21
— <i>v. Jones</i>	3 Camp. 230 . . . 51
— <i>v. Lords of the Treasury</i>	4 A. & E. 286 . . . 390, 391, 395, 399
— <i>v. Ravenstone</i>	5 T. R. 373 . . . 774
— <i>v. Smith</i>	4 Esp. 109 . . . 215
— <i>v. Tenant</i>	2 Ld. Raym. 1423; 2 Str. 716 . . . 17, 18, 21, 22
— <i>v. Ward</i>	4 A. & E. at p. 405 . . . 215
<i>Rhodes, Ex parte</i>	15 Ves. 539 . . . 503
<i>Richards v. Marine Insurance Company</i>	3 Johns. U. S. Rep. 307 . . . 705
<i>Rickett's, Ex parte</i>	4 A. & E. 999 . . . 391
<i>Rickman v. Carstairs</i>	5 B. & Ad. 651, at p. 663 . . . 582
<i>Ridgway v. Wharton</i>	6 H. L. C. 238 . . . 306
<i>Right v. Bawden</i>	3 East, 260 . . . 683
<i>Roads v. Trumpington</i>	Law Rep. 6 Q. B. 56 . . . 96, 101
<i>Roberts v. Aylesbury</i>	1 E. & B. 423 . . . 330
— <i>v. Grand Trunk Railway of Canada</i>	Not reported . . . 296
— <i>v. Haines</i>	6 E. & B. 643; 7 E. & B. 625 . . . 721
— <i>v. Roberts</i>	5 B. & S. 384 . . . 114, 115
<i>Roe v. Hutton</i>	2 Wils. 162 . . . 683
<i>Rogers v. Spence</i>	12 Cl. & F. 700, 702 . . . 613
<i>Ross v. Johnson</i>	5 Burr. 2825 . . . 621, 628
<i>Routh v. Roublot</i>	1 E. & E. 850 . . . 159, 162, 164, 701
<i>Rowbotham v. Wilson</i>	8 H. L. C. 348, 360 . . . 721, 722, 726
<i>Rylands v. Fletcher</i>	Law Rep. 3 H. L. 330 . . . 662, 663, 664, 666

S.

<i>Sawyer v. Paddington</i>	Law Rep. 6 Q. B. 164 . . . 191
<i>Scott v. Libby</i>	2 Johns. 336 . . . 408
<i>Shepherd v. Beecher</i>	2 P. Wms. 288, 290 . . . 676, 679, 680
<i>Sichel v. Borch</i>	2 H. & C. 954 . . . 575, 576
<i>Siddall v. Rawcliffe</i>	1 Cr. & M. 487 . . . 495
<i>Simmons v. Swift</i>	5 B. & C. 857 . . . 312, 445, 447, 450, 454, 456
<i>Simons v. Patchett</i>	7 E. & B. 568 . . . 200
<i>Skillett v. Fletcher</i>	Law Rep. 2 C. P. 469 . . . 670
<i>Slater's Case</i>	Cro. Car. 470 . . . 17, 22

	PAGE
Sloper <i>v.</i> Cottrell	6 E. & B. 497 219
Smart <i>v.</i> Morton	5 E. & B. 30 721, 722, 726
Smethurst <i>v.</i> Mitchell	1 E. & E. 622 599
Smith <i>v.</i> Bank of Scotland	1 Dow. 272, 292 672, 673, 574, 675, 680
— <i>v.</i> Kenrick	7 C. B. 515 253
— <i>v.</i> St. Michael's, Cambridge	3 E. & E. 383 96, 100
— <i>v.</i> Winter	4 M. & W. 454 677
Smyth <i>v.</i> Anderson	7 C. B. at p. 39 607, 608
Snead <i>v.</i> Watkins	1 C. B. (N.S.) 267 713
Soule <i>v.</i> Rodocanachi	1 Newberry, Adm. R. 504 226
Spence <i>v.</i> Chodwick	10 Q. B. 517 407
Spencer <i>v.</i> Marriott	1 B. & C. 457; 2 D. & Ry. 665 319, 320, 321, 322, 324, 325, 327, 665
Spitta <i>v.</i> Woodman	2 Taunt. 416 584
Standish <i>v.</i> Ross	3 Ex. 527 178
Steamboat Lynx <i>v.</i> King	12 Misso. 272 226
Steele <i>v.</i> Stewart	1 Phil. 147 770
Stephens <i>v.</i> Elwall	4 M. & S. 259 635
St. Mary, Newington <i>v.</i> Jacobs	Law Rep. 7 Q. B. p. 47 172
Stoate <i>v.</i> Rew	14 C. B. (N.S.) 209 241, 243
Stone <i>v.</i> Marsh	6 B. & C. 551 555, 556
Stourbridge Navigation <i>v.</i> Earl of Dudley	3 E. & E. 409 365
Strange <i>v.</i> Fooks	4 Giff. 408, at p. 412 760, 765
Straton <i>v.</i> Rastall	2 T. R. 366 761
Stretton <i>v.</i> Great Western Railway Com- pany	Law Rep. 5 Ch. App. 751 6
Stroyan <i>v.</i> Knowles	6 H. & N. 454 722
Swan's Case	Moo. 74; Dyer, 257; Bendl. 150; And. 12 322
Sympton <i>v.</i> Prothero	26 L. J. (Ch.) 671 502

T.

Taaffe <i>v.</i> Conmee	10 H. L. C. 81 119
Tabart <i>v.</i> Tipper	1 Camp. 350 12
Talargoch Mining Company <i>v.</i> St. Asaph	Law Rep. 3 Q. B. 478 337
Tancred <i>v.</i> Leyland	16 Q. B. 669 121
Tanner <i>v.</i> Smart	6 B. & C. 603 496, 497, 498
Taylor <i>v.</i> Marling	2 Man. & G. 55 536
— <i>v.</i> Metropolitan Board of Works	Law Rep. 2 Q. B. 213 192
— <i>v.</i> St. Mary Abbott	Law Rep. 6 C. P. 309 473
Tenant <i>v.</i> Goldwin	1 Salk. 360 33
Teutonia, The	Law Rep. 3 A. & E. 394 415
Thomson <i>v.</i> Davenport	9 B. & C. at pp. 86, 88 607, 608, 610
Thorp <i>v.</i> Browne	Law Rep. 2 H. L. 220, 236 159, 160, 163
Tinkler <i>v.</i> Poole	5 Burr. 2657 621
Tippets <i>v.</i> Heane	1 C. M. & R. 252 496
Touteng <i>v.</i> Hubbard	3 B. & P. 291 412
Tronson <i>v.</i> Dent	8 Moo. P. C. 419, 449 226, 230
Trueman <i>v.</i> Fenton	Cowp. 544 536
Tubb <i>v.</i> Good	Law Rep. 5 Q. B. 443 58
Tugman <i>v.</i> Hopkins	4 M. & G. 389 219
Tulk <i>v.</i> Moxhay	2 Phill. 774 320
Tullock <i>v.</i> Dunn	Ry. & Moo. 416 496
Turley <i>v.</i> Bates	2 H. & C. 200 445, 447, 449, 455
Turrill <i>v.</i> Crawley	13 Q. B. 197 713, 714

V.

	PAGE
Van Sandau <i>v.</i> Corsbie	3 B. & Ald. 13. 536

W.

Wainman <i>v.</i> Kynman	1 Ex. 118	496
Walker <i>v.</i> Roston	9 M. & W. 411	595
Wallington <i>v.</i> White	10 C. B. (N.S.) 128	191
Waring <i>v.</i> Favenck	1 Camp. 85	606
Waters <i>v.</i> Monarch Assurance Company	5 E. & B. 870	446
Watts <i>v.</i> Shuttleworth	5 H. & N. 235	760, 761
Warwick <i>v.</i> Slade	3 Camp. 127	309
Wellock <i>v.</i> Constantine	2 H. & C. 146	555, 556, 562
Wetherell <i>v.</i> Julius	10 C. B. 267	613
White, Ex parte	Law Rep. 6 Ch. App. 397	599
— <i>v.</i> Spettigue	13 M. & W. 603	555, 557, 559, 562
Whitechurch <i>v.</i> Fulham Board of Works	Law Rep. 1 Q. B. 233	192
Whitehouse <i>v.</i> Birmingham Canal Com- pany	27 L. J. (Ex.) 25	253
Whithorn <i>v.</i> Thomas	7 M. & G. 1	473
Wickham <i>v.</i> Hawker	7 M. & W. 63	321
Wilbraham <i>v.</i> Snow	2 Wms. Saund. 47d.	626
Williams <i>v.</i> Everett	14 East, 582	595
— <i>v.</i> Lloyd	Sir W. Jones, 179	408
— <i>v.</i> Mostyn	4 M. & W. 145	177
Wilson <i>v.</i> Anderton	1 B. & Ad. 450	595
— <i>v.</i> Hart	Law Rep. 1 Ch. App. 463	320, 325, 326
— <i>v.</i> —	7 Taunt. 295	606
— <i>v.</i> Hoare	2 B. & Ad. 350	683
— <i>v.</i> Jones	Law Rep. 2 Ex. 139	81, 82
Wiltshire <i>v.</i> Willett	11 C. B. (N.S.) 240	694
Wood <i>v.</i> Leadbitter	13 M. & W. 838, 845	536, 595
— <i>v.</i> Manley	11 A. & E. 34	536
Woolley <i>v.</i> North London Railway Com- pany	Law Rep. 4 C. P. 602	771, 772
Woolwright, Ex parte	4 Dowl. 474	588
Worms <i>v.</i> Storey	11 Ex. 427	226, 236
Wylie <i>v.</i> Birch	4 Q. B. 566	177
Wyrley Canal Company <i>v.</i> Bradley	7 East, 368	253

X.

Xenos <i>v.</i> Wickham	Law Rep. 2 H. L. 296	306, 309
-----------------------------------	--------------------------------	----------

Y.

Yarmouth, Mayor of, <i>v.</i> Groom	1 H. & C. 102, 111	331, 332
Young <i>v.</i> Matthews	Law Rep. 2 C. P. 127	446

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXV VICTORIA.

STONEHAM *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

1871

Nov. 10.

Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 99-107, Compensation to Commoners under—Remedy by Commoners, when Land occupied without Payment of Compensation.

Under ss. 99-107 of the Lands Clauses Consolidation Act, if a railway company take possession, by virtue of their Act, of land over which there are rights of common, after payment to the lord of the manor of compensation in respect of his ownership in the soil and a conveyance by him to the company, and they construct their railway on the land without having first paid compensation to the commoners in respect of their rights of common, a commoner may maintain an action against the company for the disturbance of his rights of common.

ACTION by the plaintiff for the disturbance by the defendants of a right of common of pasture over Tooting Beck Common, in the county of Surrey, part of which was taken by the West End of London and Crystal Palace Railway Company, in the year 1853, for the construction of their line, under the West London and Crystal Palace Railway Act, 1853; which railway was purchased

1871
STONEHAM
v.
LONDON AND
BRIGHTON
RAILWAY CO.

by the defendants under the provisions of the West London and Crystal Palace Railway Act, 1857.

At the trial at the Surrey Summer Assizes, 1869, before Kelly, C.B., a verdict was found, by consent, for the plaintiff, subject to a case.

Tooting Beck Common is part of the waste lands of the manor of Tooting Beck, and from time immemorial the copyholders of the manor have exercised a right of common of pasture over the common for all their commonable cattle, levant and couchant, on their respective copyhold tenements. One of the copyhold tenements is an estate called the "Streatham Park Estate," containing about 68 acres, principally pasture-land, on which a greater number of cattle could be maintained than could be maintained on Tooting Beck Common. In the year 1853, and until the 3rd of April, 1862, George Phillipps was seised in fee of the Streatham Park Estate. According to the custom of the manor, on the 3rd of April, 1862, the estate was enfranchised by Mr. Phillipps, under the Copyhold Act, 1852, ss. 45, 48; and he remained seised of it until his death in 1865, devising it by his will to trustees, of whom the plaintiff, at the commencement of this action, was the survivor.

At the time of the passing of the West London and Crystal Palace Railway Act, 1853, the only copyhold tenants of the manor were the said George Phillipps, as tenant of Streatham Park Estate, and Messrs. Loat and others, as joint tenants of a public-house called "The Bell," to which no pasture-land was attached; and, in fact, George Phillipps was the only tenant exercising the right of common of pasture over Tooting Beck Common.

The common, before the construction of the railway, contained about 155*a. 3r. 8p.*, of which the railway company took 4*a. 3r. 7p.* under their Act, thus leaving 151*a. 0r. 1p.* The fee simple of the 4*a. 3r. 7p.* was conveyed by the lord and lady of the manor to the railway company on the 28th of December, 1855.

The railway company took possession of the 4*a. 3r. 7p.* shortly after the Act of 1853 was passed, having, when they so took possession, taken no proceedings under the Lands Clauses Consolidation Act, 1845, to settle or ascertain the compensation (if any) to which Mr. Phillipps was entitled in respect of the diminution of

the right of common of pasture caused by their taking this part of the common ; and in and about September, 1853, several letters were written by Mr. Phillipps's solicitor to the solicitors of the railway company, as to taking steps to settle the compensation to be paid for the commonable rights, but no proceedings were taken by them to ascertain the compensation ; and on the 15th of June, 1857, a notice was served on the company on behalf of Mr. Phillipps, to convene a meeting of the parties entitled to commonable rights upon Tooting Beck Common, and to proceed as directed by the Lands Clauses Consolidation Act, 1845, to ascertain the compensation. No meeting was convened in pursuance of this notice. On the 14th of April, 1858, Mr. Phillipps served a notice of claim on the railway company ; and on the 21st of November, 1858, he obtained a rule calling upon them to shew cause why a mandamus should not issue, commanding them to convene a meeting under the Lands Clauses Consolidation Act, 1845, s. 102. This rule was duly served. Upon the service of this rule, some correspondence took place between the respective solicitors, and the advertisement and notice mentioned in s. 102 of the Lands Clauses Consolidation Act were published and served. A meeting was appointed by the advertisement and notice, to be held at Streatham on the 12th of February, 1859 ; and Mr. Phillipps and several other persons met on that day at the place appointed, but no effectual meeting of parties entitled to commonable rights on the common took place. Soon after the meeting, a surveyor, appointed by Mr. Phillipps and Mr. Loat, one of the joint tenants of "The Bell" public-house, had several interviews with the surveyors of the defendants, in which the question of compensation was discussed ; but no result was arrived at.

Afterwards a correspondence took place between the solicitor of Mr. Phillipps on one side, and the surveyor and solicitors of the defendants on the other side, in which an arbitration on the claim was discussed. From this time until the 3rd of August, 1868, no proceedings were taken, or letters written, with respect to the claim. On that day a letter was written by the solicitors of Mr. Phillipps's trustees to the defendants, " requiring the company to call a meeting, pursuant to s. 102 of the Lands Clauses Consolidation Act, to assess the amount payable in respect of the

1871 .
STONEHAM
v.
LONDON AND
BRIGHTON
RAILWAY Co.

1871
 STONEHAM
 v.
 LONDON AND
 BRIGHTON
 RAILWAY CO.

copyhold rights over the portion of Tooting Beck Common taken by the company for the purposes of their railway." This letter led to a lengthened correspondence between the same parties, but no arrangement for settling the claim for compensation being arrived at, on the 24th of June, 1869, this action was commenced.

The construction of the railway across the common was completed in the lifetime of George Phillipps: he took no proceedings to oppose, but gave no formal consent to its construction.

Unless the conveyance by the lord and lady of the manor on the 28th of December, 1855, is in itself an approvement of the 4a. 3r. 7p., there has been no approvement by them of this part of the common.

The injury done to the plaintiff's right of common, by the mere taking by the railway company of the 4a. 3r. 7p., is too small to be appreciable; but the construction of the line severs a triangular piece on one side of the railway from the rest of the common, and the effect of this is, although there is access to it from the rest of the common, by an archway under the railway, that a commoner is deprived of the use of the pasture of this triangular piece to the same extent to which he enjoyed it before the railway was made. Subject to any question of law arising on the case, the loss to the plaintiff of the enjoyment, to the same extent as before the railway was made, of this triangular piece, as well as of the 4a. 3r. 7p., entitles the plaintiff to a verdict for more than nominal damages.

The Court is to be at liberty to draw inferences of fact.

The questions for the opinion of the Court were:—1. Whether the plaintiff is entitled to maintain this action; 2. If it cannot be maintained, whether the plaintiff is entitled to recover compensation by any other mode of proceeding.

Prentice, Q.C. (with him *Murphy*), for the plaintiff [after reading ss. 99–107 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18) (1)]:—It is clear, on the construction of those sections, that

(1) 8 Vict. c. 18: "And with respect to any such lands being common or waste lands, be it enacted as follows:—Sect. 99. The compensation in respect of the right in the soil of any lands	subject to any rights of common shall be paid to the lord of the manor, in case he shall be entitled to the same, or to such party, other than the commoners, as shall be entitled to such right in the
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the railway company having paid compensation to the lord of the manor only, and paid neither to the commoners nor into the bank the compensation due to the commoners, on entering upon the

1871

STONEHAM
v.
LONDON AND
BRIGHTON
RAILWAY CO.

soil; and the compensation in respect of all other commonable and other rights in or over such lands, including therein any commonable or other rights to which the lord of the manor may be entitled, other than his right in the soil of such lands, shall be determined and paid and applied in manner hereinafter provided with respect to common lands, the right in the soil of which shall belong to the commoners; and upon payment or deposit in the bank of the compensation so determined, all such commonable and other rights shall cease and be extinguished."

Sect. 100: "Upon payment or tender to the lord of the manor, or such other party as aforesaid, of the compensation which shall have been agreed upon or determined in respect of the right in the soil of any such lands, or on deposit thereof in the bank in any of the cases hereinbefore in that behalf provided, such lord of the manor, or such other party as aforesaid, shall convey such lands to the promoters of the undertaking, and such conveyance shall have the effect of vesting such lands in the promoters of the undertaking, in like manner as if such lord of the manor, or such other party as aforesaid, had been seised in fee simple of such lands at the time of executing such conveyance; and in default of such conveyance, it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed-poll, duly stamped, in the manner hereinbefore provided in the case of the purchase of lands by them, and thereupon the lands in respect whereof such last-mentioned compensation shall have been deposited as aforesaid shall vest absolutely in the promoters of the un-

dertaking, and they shall be entitled to immediate possession thereof, subject, nevertheless, to the commonable and other rights theretofore affecting the same, until such rights shall have been extinguished by payment or deposit of the compensation for the same in manner hereinafter provided."

Sect. 101: "The compensation to be paid with respect to any such lands, being common lands, or in the nature thereof, the right to the soil of which shall belong to the commoners, as well as the compensation to be paid for the commonable and other rights in or over common lands the right in the soil whereof shall not belong to the commoners, other than the compensation to the lord of the manor, or other party entitled to the soil thereof, in respect of his right in the soil thereof, shall be determined by agreement between the promoters of the undertaking and a committee of the parties entitled to commonable or other rights in such lands, to be appointed as next hereinafter mentioned.

By ss. 102-104, it shall be lawful for the promoters to convene, by notice, &c., a meeting of the parties entitled to commonable or other rights, to treat with the promoters; the meeting may appoint a committee not exceeding five, and the decision of a majority of the meeting shall bind the minority and all absent parties; the committee may make a binding agreement with the promoters. By s. 105, if the committee fail to agree with the promoters, the amount is to be determined as in other cases of disputed compensation. By s. 106, if no committee be appointed the amount is to be determined by a

1871
STONEHAM
v.
LONDON AND
BRIGHTON
RAILWAY CO.

lands, held it subject to the rights of the commoners; and therefore the plaintiff, as one of the commoners, can maintain an action for the disturbance of his right of common. The above sections are framed precisely on the same principle as s. 84, and the other sections as to taking freehold lands; and the full Court of Appeal, in *Stretton v. Great Western Ry. Co.* (1), held that ejectment might be maintained against a railway company who had entered land and constructed their railway upon it without having first paid compensation to the owner.

Pollock, Q.C. (*Warton* with him), for the defendants. The proper course for the plaintiff was by mandamus to the company to take proceedings under the statute, to ascertain the amount of compensation due to him, and not by action: *Glover v. North Staffordshire Ry. Co.* (2) An action would treat the defendants as trespassers, whereas they had the right, under s. 100, to enter the land on payment of compensation to the lord and a conveyance by him.

[HANNEN, J. They are put in the position of the lord: and the same action would have lain against the lord.]

Conceding that that action would have lain, the defendants can justify under 8 Vict. c. 20, ss. 6, 7.

[LUSH, J. The defendants had a right to take the land and enter, upon paying compensation to the lord; but the question is, whether s. 100 of 8 Vict. c. 18, means, by "subject to the commonable and other rights affecting the same," what it says, or subject only to pay compensation for them.]

surveyor appointed by two justices, as in the case of parties who cannot be found (s. 59).

Sect. 107: "Upon payment or tender to such committee, or any three of them, or, if there shall be no such committee, then upon deposit in the bank, in the manner provided in the like case of the compensation which shall have been agreed upon or determined in respect of such commonable or other rights, it shall be lawful for the promoters of the undertaking, if they think fit, to execute

a deed-poll duly stamped in the manner hereinbefore provided in the case of the purchase of lands by them, and thereupon the lands in respect of which such compensation shall have been so paid or deposited shall vest in the promoters of the undertaking, freed and discharged from all such commonable or other rights, and they shall be entitled to immediate possession thereof; . . ."

(1) Law Rep. 5 Ch. App. 751.

(2) 16 Q. B. 912; 20 L. J. (Q.B.) 376.

By s. 84, the company is expressly forbidden to enter the land until all compensation has been paid; but there is no such prohibition in the section as to copyhold lands and commonable rights.

Prentice, Q.C., was not heard in reply.

1871

STONEHAM
v.
LONDON AND
BRIGHTON
RAILWAY CO.

COCKBURN, C.J. We are all agreed that an action will lie. The company take part of the wastes of the manor with rights of common over the waste, and in order to get full and entire property and possession, they must settle not only with the lord as owner of the soil, but with the commoners who have rights of common over the wastes. With regard to their settling the compensation in order to obtain possession of the land, the Act of Parliament says that when they have done certain things, and have made compensation to the lord, they shall be entitled to possession, but subject to the commonable rights of the commoners; in other words, that they shall stand in the place of the lord. If it rested there, just as the lord would be liable for a disturbance of the rights of the commoners, the company standing in his shoes would be liable to have an action brought against them for any disturbance of those rights. Then the statute goes on to make provision for extinguishing the rights of the commoners, and a certain course is pointed out, which may be pursued in order to ascertain what the commonable rights are, and in order to secure compensation being made. It is only on that being completed that the rights of the commoners are extinguished, and the company obtain the absolute interest in the soil divested of all the rights of the commoners. It is clear from all the provisions of the statute that the initiative is with the company: if the company do not choose to take that initiative to extinguish the rights of the commoners, then it is clear to my mind it was not intended that those rights should be extinguished. If those rights are not extinguished, but are disturbed, the ordinary remedy which the commoners have in such a case remains; and, inasmuch as the company do not take the course prescribed by the statute in order to get the rights of common extinguished, although they have possession by virtue of their agreement and compensation made to the lord, the rights of the commoners in the wastes of the manor remain just as they were before; and it is the company's own fault, and they have

1871

STONEHAM
v.
LONDON AND
BRIGHTON
RAILWAY CO.

themselves only to blame for not having got those rights extinguished.

The only doubt raised upon the matter is, that there is an absence of prohibitory clauses against the company taking possession until certain things have been completed. I do not think that that really makes any material difference. It is plain that the words of the statute do not intend that any rights of common should be extinguished without the commoners having legal remedies; but it was intended that the land should not be taken from the commoners by the railway company until the railway company had made compensation in satisfaction of those rights.

MELLOR, J. I am of the same opinion. I think the whole question turns upon this, is it a condition imposed on the company that they are to pay before they take possession? I think it is. In case the commoners do not agree upon the price to be paid, the company may go before justices to appoint a valuer; and I think it is only on the performance of that condition, and upon the payment of money into the bank, when the amount has been ascertained by the valuer appointed by the justices, that they are entitled to interfere with the rights of the commoners. And I think, although there is an absence of prohibitory clauses in this part of the statute, yet the prohibition is implied in the very terms of s. 107, for it says that, upon payment or deposit of the compensation, "the lands in respect of which such compensation shall have been so paid or deposited, shall vest in the promoters of the undertaking freed and discharged from all such commonable or other rights, and they shall be entitled to immediate possession thereof." I cannot but think that the effect of that section is to imply that it is a condition that they shall ascertain and pay or deposit the amount of compensation before they are entitled to interfere with the rights of the commoners.

There is really no inconvenience in the matter at all. If the company cannot agree with the commoners, and the meeting is ineffectual, their course of proceeding is very simple—namely, to go before justices and get them to appoint a valuer; and upon his valuation, then to pay the money into the bank if the commoners do not choose to accept it; and then, and not till then, are the

company to be entitled to the possession of the land free and discharged from all commonable and other rights existing thereon.

1871

STONEHAM
v.
LONDON AND
BRIGHTON
RAILWAY CO.

LUSH, J. I am of the same opinion. The question is, whether it is a condition precedent to the right of the railway company to disturb the commoners in their rights of common, that they should first assess and pay the valuation either to the commoners or into the bank. I am of opinion that it is a condition precedent. That being so, they have interfered with the rights of the common, which they had no right to do by the Act, and consequently an action will lie.

I think that this is plain by taking the 100th and the 107th sections together. The 100th section says that upon payment, &c., to the lord, "the land shall vest absolutely in the promoters of the undertaking, and they shall be entitled to immediate possession thereof" (that is, of the land), "subject, nevertheless, to the commonable and other rights theretofore affecting the same, until such rights shall have been extinguished by a payment or deposit of the compensation for the same in manner hereinafter provided." Now, does that mean that they shall hold the land as the lord held it, subject to the rights of the commoners to exercise their rights of common, until those rights have been extinguished; or does it mean, subject to the right of the commoners to compensation for the extinguishment of their commonable rights? I think it means the first—namely, that they are to hold it subject to the rights of the commoners, which rights are to continue just as they would have continued if the lord had not parted with his interest in the soil. That is made abundantly clear by the 107th section, which provides for the extinguishment of the rights of common. After providing for committees, where there is a multitude of commoners, and for the majority binding the minority, and so on—it then says: "Upon payment or tender to such committee, or any three of them, or, if there shall be no such committee, then upon deposit in the bank, in the manner provided in the like case, of the compensation which shall have been agreed upon or determined in respect of such commonable or other rights, it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed-poll duly stamped in the manner hereinbefore provided in the case of

1871
STONEHAM
v.
LONDON AND
BRIGHTON
RAILWAY CO.

the purchase of lands by them, and thereupon the lands in respect of which such compensation shall have been so paid or deposited, shall vest in the promoters of the undertaking freed and discharged from all such commonable or other rights, and they shall be entitled to immediate possession thereof." Therefore, until they have paid the compensation for them, they are not to be considered to be in possession of the commonable rights. Taking those two sections together, I think it is clear that until the company have extinguished the rights of the commoners by payment or by deposit, they hold the soil which they have purchased of the lord of the manor upon the same terms as the lord of the manor himself would have held it—that is, subject to the rights of the commoners to exercise their rights of common. That being so, the company having disturbed the rights of the commoners without having paid the money or deposited it in the bank, I am of opinion that they are liable to an action for that disturbance.

HANNEN, J. I am entirely of the same opinion.

PER CURIAM. We answer the first question submitted to us in the affirmative; and there must be judgment for the plaintiff accordingly.

Judgment for the plaintiff.

Attorneys for plaintiff: *Holmer, Robinson, & Stoneham.*

Attorneys for defendants: *Baxter, Rose, & Norton.*

JENNER AND ANOTHER v. A'BECKETT.

1871

Libel—Defamation as to Goods manufactured by Plaintiff—Action, when maintainable.

Nov. 17.

Declaration, that the plaintiffs were manufacturers of bags, and manufactured a bag which they called the "Bag of Bags," and the defendant printed and published, concerning the plaintiffs in their business, the words following:—"As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public ad nauseam":—

Held, on demurrer, by Mellor and Hannen, JJ., that it was a question for the jury whether the words did not convey an imputation on the plaintiffs' conduct in their business, and whether the language went beyond the limits of fair criticism.

By Lush, J., that the words could not be deemed libellous, either upon the plaintiffs or upon their mode of conducting their business.

DECLARATION that the plaintiffs carried on the business, amongst other businesses, of manufacturers of bags, and in such business invented, manufactured, and sold for gain and reward in that behalf great numbers of a certain bag called the "Bag of Bags," and the defendant, well knowing the premises, maliciously printed and published of and concerning the plaintiffs in their said business, and of and concerning them in the manufacturing and selling of the said bags, in a certain periodical or paper called *The Tomahawk*, the false and defamatory words following:—"Novelty and enough. Let us premise our remarks by declaring that they are not a planned advertisement, and then let us declare that Messrs. Jenner and Knewstub" (meaning the plaintiffs), "of St. James's Street, have introduced and largely advertised an article of their manufacture as the Bag of Bags" (meaning the said bag so manufactured and sold by the plaintiffs). "As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public ad nauseam."

Demurrer, and joinder in demurrer.

Joyce (*Steele* with him) in support of the demurrer. The words set

1871
JENNER
v.
A'DECKETT.

out in the declaration are not libellous. There is no imputation on the character of the plaintiffs; the language applies to the name of an article manufactured by them. If the words are defamatory, they disparage a chattel, and are to be governed by the rule applicable to slander of title; no action for which lies without special damage: *Malachy v. Soper* (1). Here there is no averment that special damage has been sustained. *Evans v. Harlow* (2) is a strong authority that the action will not lie. This case shews that a mere reflection on goods manufactured by a tradesman is not actionable; there must be something more; it must appear that the publication of the libel has prevented a sale of the goods, or has been otherwise injurious, either to the character or the business of the tradesman.

Parry, Serj. (*J. O. Griffiths* with him), contra. The cases cited are not in point. *Malachy v. Soper* (1) was a case of slander of title; in *Evans v. Harlow* (2), the defamatory words reflected on the utility of the goods manufactured by the plaintiff; here the imputation is on the conduct of the plaintiffs in giving a particular name to an article manufactured by them; and under the guise of slandering the bag, the defendant slanders the manufacturer. The question ought to be considered by a jury, whether the language used was not intended in an ironical sense, and whether the defendant, did not mean to imply that the bag was neither portable, elegant, nor useful; and if this were so, intending purchasers would be deterred from buying it. Further, these words are actionable on the ground that they throw discredit upon a commodity in which the plaintiffs deal: *Starkie on Slander*, 3rd ed., p. 161. And this case is governed by the principle on which it has been held actionable to say of a bookseller that he is in the habit of publishing immoral and foolish books: *Tabart v. Tipper* (3).

[MELLOR, J., referred to *Campbell v. Spottiswoode* (4).]

Joyce, in reply.

MELLOR, J. I regret that a difference of opinion as to this declaration exists upon the Bench; and I may say, that some portion of the language complained of, if defamatory at all, conveys an im-

(1) 3 Bing. N. C. 371.

(2) 5 Q. B. 624.

(3) 1 Camp. 350.

(4) 3 B. & S. 769; 32 L. J. (Q.B.) 185.

9 Feb. 1874

putation so slight, that if this portion alone had been used, the plaintiffs would have no case to lay before a jury. The words to which I refer are these :—"As we have not seen the 'Bag of Bags,' we cannot say that it is useful, or that it is portable, or that it is elegant; all these it may be." If the writer had stopped there, I should have thought that those words could not be actionable without some allegation that they were intended and calculated to convey an impression that the bag was not portable, or useful, or elegant; and if no more had been alleged, I should have been indisposed to think that the declaration disclosed a cause of action. But we must consider the succeeding words, which are as follows :—"But the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public ad nauseam." This may be a fair criticism on the conduct of the plaintiffs in giving such a title as "Bag of Bags" to an article sold by them; but I cannot help thinking that it is for a jury, and not for the Court, to consider whether these words do or do not go beyond the limits of fair criticism. The jury may think that this bag has been advertised ad nauseam, and that the object of giving it the name above mentioned is to attract buyers in a manner that is, perhaps, untradesmanlike. I believe that if they take this view they will deem the criticism fair, and therefore justifiable. But I cannot say, as a matter of law, that the words do not convey an imputation upon the plaintiffs' mode of carrying on their business, and do not in effect allege that they have done a silly, slangy, and vulgar act. A jury may think this language calculated to bring the plaintiffs into odium, and to disparage them in the opinion of the public in respect of the manner in which they conduct their business. I should be glad to see my way to a different conclusion, because actions of slander and libel, unless they are brought in respect of a serious charge, are not to be encouraged; but I cannot say that the declaration does not set forth matter for the consideration of a jury; and I cannot, on demurrer, hold that the defendant is entitled to succeed.

1871

JENNER
v.
A'BECKETT.

LUSH, J. I cannot bring my mind to the conclusion that any part of the language complained of can be considered libellous. I

1871

JENNER
v.
A'BECKETT.

think that the Court, before giving judgment for him, is bound to see that the words are capable of casting an imputation upon the character of the person complaining, or upon his conduct in carrying on his trade; and the imputation must be of a kind likely to injure him in public estimation, or to injure him in his trade. If the words, fairly read, are not capable of the above-mentioned construction, I think it the duty of the Court to hold that they ought not to be submitted to a jury. I am unable to see in the words of the alleged libel any imputation on the character of the plaintiffs, or on the mode in which they carry on their business. The subject of the alleged libel is an article which the plaintiffs have advertised as of their manufacture, and to which they have given the title of "The Bag of Bags." Now, it is competent to every member of the community to express his opinion as to the good taste of giving that title to the article. It has been contended that the first part of the libel may turn out to have been used ironically, and is, moreover, capable of conveying to the public the impression that the bag is not useful, not portable, and not elegant. Even if some of these words be capable of being used ironically, I fail to see that any person can reasonably interpret them in that sense, when the writer states that he has not seen the bag, and therefore cannot say that it is neither useful, nor portable, nor elegant, and that it may have all these qualities. It would do violence to language to say that these words were used ironically, that the writer had seen the bag, and that he intended to describe it as neither useful, portable, nor elegant. If the jury should find that to be the meaning of the words, I should hold the verdict to be wrong. I cannot say there is any imputation upon the bag.

It is necessary to consider the remainder of the alleged libel, which is as follows:—"But the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public ad nauseam." Can it be held to be libellous upon a person, to say that the title given by him to an article of his manufacture is silly, slangy, and vulgar? It is entirely a matter of taste and of opinion. The title of an article may be silly, slangy, and vulgar in the estimation of one person, and not in the estimation of another. At all

events, the writer of this passage sets out the words upon which he comments, and gives every opportunity of judging whether he is justified in his criticism. If this passage is libellous, it seems to me it would be libellous for any critic to say of a book, a poem, or a drama, "The title which the author has thought fit to give to his work is silly, slangy, and vulgar." In my opinion that would be a very dangerous extension of the law of libel.

1871
JENNER
v.
A'BECKETT.

HANNEN, J. I am of opinion that, upon this declaration, there is a question to be left to the jury, and that they have to determine whether or not the language used is only a fair criticism, or whether this passage was written with the intention of unduly disparaging the plaintiffs. It seems to me that much may be said in support of the argument, that these words are not written as a fair criticism, but are intended to injure. The title of an article sold by a tradesman does not usually attract the attention of critics, and it may be thought that the defendant was induced by some motive other than a regard for good taste to notice the name that had been given to an article of commerce. The writer says, "The title we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public ad nauseam." It is for the jury, taking into their consideration all the circumstances, to say whether or not it was intended to disparage the plaintiffs in the conduct of their business.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Hughes & Son.*

Attorneys for defendant: *Evans, Laing, & Eagles.*

1871

Nov. 16.

THE QUEEN *v.* GLYNNE AND OTHERS.

Proceedings in Bastardy—Decision of Quarter Sessions on Appeal Final—
 7 & 8 Vict. c. 101, ss. 2-4; 8 Vict. c. 10, s. 6.

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384,385 Where on appeal to quarter sessions an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence, as required by 8 Vict. c. 10, s. 6, the order of quarter sessions is a decision on the merits, and is final, and fresh proceedings cannot be taken before justices.

RULE calling upon Sir Stephen Richard Glynne, Bart., and others, Justices of Flintshire, and W. Smith, to shew cause why the justices, or any two of them, should not adjudicate upon a summons, dated the 5th of May, 1871, issued on the application of Louisa Jackson, alleging Smith to be the putative father of her bastard child.

From the affidavits filed on moving and shewing cause, it appeared that Louisa Jackson had been delivered of a child on the 9th of January, 1871, and a summons was taken out against Smith, and an order affiliating the child on him was made by justices in petty sessions on the 9th of February, after a full hearing of the evidence of the mother and defendant, and of several witnesses on both sides. Smith appealed to the next Easter quarter sessions. At the hearing of the appeal on the 8th of April, after the respondent and the only two witnesses called by her counsel had been examined and cross-examined, counsel for the appellant submitted that there was not sufficient corroborative evidence, as required by the statute (8 Vict. c. 10, s. 6) (1). After

(1) 8 Vict. c. 10, s. 6: "And whereas by the said recited Act [7 & 8 Vict. c. 101, s. 3] it is enacted that where any woman shall apply to the justices at a petty session for an order upon the person whom she shall allege to be the father of her bastard child, such justices shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the said mother be cor-

roborated in some material particular by other testimony to the satisfaction of the said justices, they may make such order as is therein set forth: And whereas power is thereby [s. 4] given to the putative father to appeal to the general quarter sessions of the peace against such order, but it is not therein set forth what evidence the said general quarter sessions shall or may hear on the trial of such appeal, and doubts have been raised as to whether the said mother can be heard by the said court

having retired for consultation with the other justices, the chairman said, "What we have to consider is, whether the evidence of the respondent is corroborated with regard to the main issue in any material point; a large majority of us are of opinion it is not, and therefore we do not call upon the appellant to reply. The order is consequently quashed."

The order of quarter sessions was that it is adjudged that the order of petty sessions be quashed without costs.

A fresh summons was then obtained on behalf of the mother, but the justices in petty sessions, on the 25th of May, refused to hear it, on the ground that the order of quarter sessions was final in the matter.

Sir J. D. Coleridge, A.G., and McIntyre, shewed cause. Proceedings in bastardy are now under 7 & 8 Vict. c. 101, and 8 Vict. c. 10. Here an order of affiliation having been made by justices in petty sessions, that order was quashed on appeal by the quarter sessions on the ground of the insufficiency of the corroborative evidence, and it is now sought to re-open the matter. The decision of quarter sessions is final; this was clearly established under the old law by a long series of cases, of which the case of *Rex v. Tenant* (1) is precisely in point, and there is an *Anonymous Case* in Ventris to the same effect. (2) In *Rex v. Jenkin* (3), an attempt was made by justices in petty sessions to make the dismissal by them final by drawing up an order acquitting the defendant; the Court of Queen's Bench quashed the order; in doing so, however, Lord Hardwicke expressly recognizes the previous decisions in *Slater's Case* (4), *Pridgeon's Case* (5), and *Rex v.*

1871

THE QUEEN
v.
GLYNNE.

of quarter sessions; be it therefore enacted, that on the trial of any such appeal before any court of quarter sessions the justices therein assembled, or the recorder (as the case may be) shall hear the evidence of the said mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant, and proceed to hear and determine the said appeal in other respects according to law, but shall not confirm the order so appealed

against unless the evidence of the said mother shall have been corroborated in some material particular by other testimony to the satisfaction of the said justices in quarter sessions assembled, or the said recorder.

(1) 2 Ld. Raym. 1423; 2 Str. 716.

(2) 1 Vent. 59.

(3) Cas. K. B. t. Hardw. 301.

(4) Cro. Car. 470.

(5) Cro. Car. 341, 350.

1871

THE QUEEN
v.
GLYNNE.

Tenant (1), in which it had been held that orders of quarter sessions, whether on appeal or in exercise of their original jurisdiction to make orders in bastardy, under 3 Car. 1, c. 4, s. 15, were final; and he draws the distinction between the orders of justices which are mere orders, and the orders of sessions, which are in the nature of an adjudication by the court of last resort.

[BLACKBURN, J. Whether a decision of a court is final or not must depend on the nature of the judgment, not on whether it is by the court of last resort; a nonsuit directed by the House of Lords would not be final in the sense of concluding the parties from bringing a second action.]

No doubt; and that may make it material to consider whether this order of sessions was on the merits. Since the late statutes there have been several cases in which the principle of *Rex v. Jenkin* (2) was recognized and acted upon, and the decisions of justices in petty sessions held not final: viz. *Reg. v. Machen* (3), which must be taken to have overruled the dicta of Erle, J., to the contrary in *Reg. v. Buckinghamshire* (4); *Reg. v. Harrington* (5); and *Reg. v. Gaunt* (6); but there is no case in which a second complaint has been allowed to be preferred where the matter has been adjudicated upon by quarter sessions on appeal. *Ex parte Harrison* (7) is no exception, for, although it is incidentally mentioned in the report, with a view to the dates, that a previous order had been quashed at sessions, that point was not before the Court; and, moreover, it has been ascertained that the order was quashed for technical informalities without any evidence being gone into, and the minute of the order of quarter sessions was "order quashed not on the merits." (8) Secondly, if that be material, the present order was on the merits. It is true that in *Reg. v. Machen* (3) and *Reg. v. Harrington* (5), there are dicta of the Court that a dismissal for insufficiency of corroborative evidence was in

(1) 2 Ld. Raym. 1423; 2 Str. 716.

(2) Cas. K. B. t. Hardw. 301.

(3) 14 Q. B. 74; 18 L. J. (M.C.) 213.

(4) 18 L. J. (M.C.) 113.

(5) 9 L. T. (N.S.) 721; 12 W. R. 420; 3 N. R. 468.

(6) Law Rep. 2 Q. B. 466.

(7) 16 Jur. 726; 19 L. T. 114.

(8) An affidavit to the above effect, by the deputy clerk of the peace of the county of Durham (from which quarter sessions the case came), was filed on shewing cause.

the nature of a nonsuit, but those dicta were directed to the question how far such a previous decision could be said to make the matter in effect *res judicata*; and it is obvious that a decision come to after hearing all the evidence the prosecutor can or chooses to adduce is just as much a decision on the merits as if evidence on both sides had been heard, and a decision then given in favour of the defendant. It is just as final as a verdict of acquittal on an indictment for perjury, which is final, although the verdict is directed for the defendant on the ground of want of a second witness. Something may be urged as to s. 6 of 8 Vict. c. 10, which forbids the quarter sessions to confirm the order unless the mother shall have been corroborated in some material particular by other testimony to the satisfaction of the justices; but the justices are to hear and determine the appeal otherwise according to law; and it is not less a decision on the merits that the quarter sessions act pursuant to the express direction of the legislature and quash an order for want of this corroborative evidence. The section simply imposes a limitation on the justices' otherwise unfettered discretion as to what amount of evidence they must have before they can decide in favour of the mother.

[LUSH, J. The preamble of the section is the key to the enactment; it is intended to put the hearing before the quarter sessions on the same footing as before the petty sessions.]

Merewether, in support of the rule. The quarter sessions quashed the order simply on the ground that there was not satisfactory corroboration of the mother's evidence, as required by the statute; that is not a decision on the merits, but is in the nature of a nonsuit.

[BLACKBURN, J. What authority is there for saying that a defect in corroborative evidence, which the statute makes essential, is not a defect upon the merits?]

In *Reg. v. Harrington* (1) Cockburn, C.J., says: "In the first place I agree with the former decision in *Reg. v. Machen* (2), that where an application of this nature is dismissed upon the ground that there has been no sufficient corroborative evidence, it is not a dismissal upon the merits; and therefore a fresh application, if made within a statutable time, may be made." And Blackburn, J.,

(1) 9 L. T. (N.S.) 721.

(2) 14 Q. B. 74; 18 L. J. (M.C.) 213.

1871

THE QUEEN

v.

GLYNNE.

says: "In *Reg. v. Machen* (1) it was decided that a mandamus should go to the justices to hear the case on a second application, without regard to the former decision being upon the merits. The Court there said that the analogy was to a nonsuit; and I by no means say that, if it appeared that the former decision were really upon the merits, I should not hold that it was final. But as it appears that the first application was dismissed for want of sufficient corroborative evidence, we cannot, without overruling *Reg. v. Machen* (1) hold that they had not jurisdiction to adjudicate upon the second application." Then Mellor, J., says: "We are certainly not justified in overruling *Reg. v. Machen* (1), and we must hold ourselves to be bound by it; and in this particular case there is not the slightest reason why we should not follow it; for although in one sense the former application was dismissed upon the merits, that is, not upon any merely technical grounds, they were not merits in the sense in which we understand them in relation to this question."

[LUSH, J. It is immaterial whether the decision of petty sessions was on the merits or not. A fresh application might have been made if the previous dismissal had been on the merits.]

No doubt that was the decision in *Reg. v. Gaunt* (2). But if the quarter sessions and petty sessions are to be guided by the same rules as to corroborative evidence, it seems anomalous, to say the least, that in one case the decision dismissing the defendant should be final, and in the other not. Moreover, the appeal is against the order of petty sessions, and the decision is that the order be quashed—in other words, made a nullity, in which case a fresh order can be obtained: *Reg. v. Brisby* (3); and in that case Patteson, J., points out that the orders in bastardy have always been treated as orders, and not as convictions.

[LUSH, J. That was a case of an order of petty sessions, not of quarter sessions.]

But if a fresh order may be made after a dismissal, or when the first order is a nullity, why not after the first order has been rendered null by the quarter sessions?

[BLACKBURN, J. On appeal to quarter sessions there is a re-

(1) 14 Q. B. 74; 18 L. J. (M.C.) 213. (2) Law Rep. 2 Q. B. 466.

(3) 2 C. & K. 962, 972.

hearing, and fresh evidence may be called. It is not like a writ of error.]

1871

THE QUEEN
v.
GLYNNE.

If the order of sessions is final, then it is possible—as, indeed, was the case in the present instance—that the quarter sessions may finally decide a case upon less evidence than in the court below. The decision of the quarter sessions has never been held conclusive under the present statutes; and there is one case, *Ex parte Harrison* (1), in which the previous order had been quashed, and yet the second order was upheld.

[BLACKBURN, J. The reason for quashing that order was not upon the merits, but that it was bad in form. It is unnecessary now to decide it, but in such a case I should be inclined to think the order of quarter sessions would not be final.]

The refusal of an order for want of corroborative evidence, and the quashing of an order for the same reason, equally leave the matter at large.

BLACKBURN, J. I think this rule must be discharged, and as there is no ground for the application, within the ordinary rule, it must be discharged with costs. The old law seems to be perfectly established by a series of cases prior to Lord Hardwicke's time, in which under the old Act of Parliament where the bastardy order had been applied for before the court of quarter sessions (I am not speaking of justices out of sessions), and the court of quarter sessions dismissed it, it was held that the decision finally bound the parties. In the case of *Reg. v. Tenant* (2) there was a decision upon this very question, whether the court of quarter sessions having dismissed the order, that would be a final decision. There, however, the court of quarter sessions had decided upon the merits, and whether that would make any difference would be another point to consider. Then arose the case of *Rex v. Jenkin* (3), before Lord Hardwicke, and he had to decide upon a different matter. There the application had been made to justices, not in sessions, but to the justices in what we now call petty sessions; and they refused it, but they went further and made an order in terms barring the mother for ever. It was not simply that they did not grant the

(1) 16 Jur. 726; 19 L. T. 114.

(2) 2 Ld. Raym. 1423; 2 Str. 716.

(3) Cas. K. B. t. Hardw. 301.

1871

THE QUEEN
v.
GLYNNE.

order, but they made an order acquitting the defendant, so that the matter was adjudicated upon finally. Upon that the decision of Lord Hardwicke was, that the matter being before justices not in quarter sessions, the decision could not be final, and accordingly the order was quashed. But Lord Hardwicke, so far from overruling the previous cases, *Slater's Case* (1) and *Pridgeon's Case* (2), which latter is the most in point with the present case, and the more recent decision of *Rex v. Tenant* (3), expressly recognizes them, and draws a distinction. He says, that in the court of quarter sessions the order is final; but not where the application is out of sessions: in that case it is but in the nature of an application for an order, and may be renewed from time to time. Whether or not the reasons of Lord Hardwicke are quite satisfactory upon that distinction, is another matter; but he clearly makes that distinction, and what he decided was, that where an order was applied for out of sessions and dismissed, it is not final. That decision was acted upon in the case of *Reg. v. Machen* (4) as well as in the case of *Reg. v. Gaunt* (5), and I apprehend it is settled that, where the application is made to the justices out of sessions their dismissal is not a bar to an application to other justices. But those cases go farther than that, for the Court held in both cases that the decision of the justices is such very weighty evidence, that, unless there is some reason to the contrary, the justices ought to view it as practically conclusive; but where it appeared that the former dismissal had been obtained upon the evidence of a witness who had been since convicted of perjury, then the justices not only had jurisdiction to rehear, but I expressed an opinion then to which I still adhere, that they not only had jurisdiction to inquire into the matter, but also that they would not attach much weight to the former order. That was solely upon the ground that they had jurisdiction to re-open the matter. The decision in the case of *Reg. v. Gaunt* (5), was, that the order of the other justices who heard the whole matter should be practically treated as conclusive; but where the former order was shewn to be obtained by perjured evidence, it should not be treated as conclusive. That is matter for the discretion of

(1) Cro Car. 470.

(3) 2 Ld. Raym. 1423; 2 Str. 716.

(2) Cro. Car. 341, 350.

(4) 14 Q. B. 74; 18 L. J. (M.C.) 213.

(5) Law Rep. 2 Q. B. 466.

the Court who tries the matter afterwards. Then again, the same decision was, in effect, come to, though not so clearly expressed, in *Reg. v. Harrington* (1), and I apprehend, that all the Lord Chief Justice meant, in what he is reported to have said in that case (where the order had been refused upon the ground of failure of corroborative evidence), "that it was not upon the merits," was not to say the decision was not upon the merits in the ordinary sense of the term; but that the decision was not to be treated as practically conclusive or as a practical estoppel, as it would have been if it had proceeded after full investigation of the question in dispute. = .

Taking that view of it, and taking that sense of the words "upon the merits," this was a decision upon the merits; and I apprehend, though I do not think it necessary to decide it, but I should be very sorry to be supposed to decide to the contrary, that although where the quarter sessions have decided, dismissing an application that decision would be a final bar, if it was upon the merits, that is to say, if it was upon the evidence before the court, yet it would not be conclusive and decisive of the matter for ever, if it were, as in the case of *Ex parte Harrison* (2) the order is alleged to have been, a decision of the court of quarter sessions, upon the ground that the order appealed against was bad in form. That, I apprehend, would not be a decision upon the merits.

But when the quarter sessions have decided, whether upon the ground that the evidence produced did not satisfy them, or that the respondent did not produce any evidence of corroboration, or whether they adjudicated that the case was defective in any other way, I apprehend their decision would be as much upon the merits as a verdict of acquittal in a criminal case, which is always final even although it proceeded upon defect of evidence. We have numerous authorities to this effect, no one case being against it; and it seems to me that there is very strong ground upon the score of convenience and good sense in saying that the decisions in the quarter sessions should be final. The first decision having been in favour of the woman, this was a rehearing; a second trial

1871

 THE QUEEN
v.
GLYNNE.

(1) 9 L. T. (N.S.) 721; 12 W. R. 420; 3 N. R. 468.

(2) 16 Jur. 726; 19 L. T. 114.

1871

THE QUEEN
v.
GLYNNE.

before the court of quarter sessions; and it certainly seems to me it would be very convenient indeed, where the sessions, the appellate tribunal, have heard and decided the case upon the merits, in the sense I have used it, upon the facts, that the matter should not be capable of being reheard by two other justices from whom there might be an appeal again to the court of quarter sessions. It seems to me far more convenient to hold that the decision of the quarter sessions was final. That has been the rule since the time of Lord Hardwicke and long before; and I see no reason for deviating from it. It follows, there having been an appeal from the decision of the justices to the quarter sessions, that the justices against whom the rule is moved had no jurisdiction, and consequently were quite right in refusing to hear the complaint. I am of opinion, therefore, that this rule should be discharged, and, as I said before, with costs.

MELLOR, J. I am of the same opinion. The law is correctly stated, as it existed before the recent statutes, in the second volume of Nolan's Poor Laws, p. 315, 4th. ed. "An order of affiliation was made by two justices, and afterwards discharged by the sessions upon appeal, after the merits were fully heard; neither two justices, nor a subsequent sessions, can make a new order for this matter as against the same person. For being legally acquitted he cannot be drawn in question again for the same fault. And it would be absurd that when two justices have power by law to make original orders, and when the sessions have power upon appeal from those orders, as well as by original application, that two justices should have power to alter their orders, when those very orders of alteration might be reversed by the sessions." That was the state of the law formerly. Then came the statutes of Victoria, and by s. 6 of 8 Vict. c. 10, it is provided what is to be the course upon the hearing of an appeal at quarter sessions, and it is necessary here to determine what is a hearing upon the merits. [The learned Judge read the enacting part of s. 6.] I think the Attorney General truly stated that independently of the qualification as to corroborative evidence, they were to proceed at sessions as before, they were to hear and determine the appeal, and the only qualification imposed upon what otherwise would have been the course of

proceeding is that they shall not confirm the order unless corroborative testimony to the satisfaction of the justices is adduced before them.

1871
THE QUEEN
v.
GLYNNE.

I quite agree with what my brother Blackburn has said upon that point. The woman, if she pleases, may produce corroborative testimony if she has any; but if she fails to produce corroborative evidence, or produces corroborative evidence which is insufficient to satisfy the justices, then they are the judges of the effect of that corroborative testimony, if any, which is offered, and if they have decided it is not sufficient to satisfy them, that, I think, is a decision, to all intents and purposes, upon the merits. It appears that all the cases upon which Mr. Merewether relied were cases in which the previous decision was not a decision of the quarter sessions, but of the petty sessions. I think the ground of distinction in those cases was rightly taken, and I think it is perfectly consistent with those cases to hold that when a hearing of this kind has taken place before a court of quarter sessions, it is final, and deprives any petty sessions thereafter of any jurisdiction to rehear.

LUSH, J. I am of the same opinion. Neither party is concluded by the decision of the petty sessions. If they decline to make an order, the woman cannot appeal to the quarter sessions against their decision, and therefore this Court has held that she is at liberty to apply again to the petty sessions, and to produce other evidence before them. If, on the other hand, the justices make an order, the putative father is, by the express terms of the statute, entitled to appeal to the quarter sessions: so that the decision of the petty sessions is not binding upon either party. Then I think both reason and convenience require us to hold that the decision of the court of quarter sessions is binding and conclusive upon the parties. The decrees of a court of appeal, from its very nature and constitution, must be binding upon the inferior tribunal; but if Mr. Merewether's argument were to prevail, the woman might now go before the magistrates and require them to hear the very same witnesses, and the very same evidence upon which the court of quarter sessions decided; and it would be competent to the petty sessions to come to a different conclusion

1871
THE QUEEN
v.
GLYNNE.

from that arrived at by the court of quarter sessions, which in effect would be to enable the inferior tribunal to overrule the decision of the superior tribunal. It is impossible that that could be the intention of the statute, and therefore I think we are bound to hold that the decision of the court of appeal is and must be binding and conclusive upon the subject-matter to which it relates. If there were no authority on the point I should without hesitation have come to that conclusion; but it is satisfactory to find that this decision is not in conflict with any decided case, but, on the contrary, is in accordance, as I understand it, with all the cases upon which this point has been raised and decided.

I have assumed that this was a decision upon the merits. Was it so? I confess that as to that point I have never had a moment's hesitation; it was a judicial conclusion upon the weight and value of the testimony presented to the court upon the very point at issue between the parties.

Rule discharged.

Attorneys for applicant: *Blakeley & Beswick.*

Attorneys for defendant: *Meredith, Roberts, & Mills, for Helps, Chester.*

Nov. 20.

THE QUEEN v. MORGAN.

Public Health Act, 1848 (11 & 12 Vict. c. 63), ss. 20, 24—Election of Local Board of Health—To qualify as "Owner," fresh Notice necessary—Form of Nomination Papers.

SQB. 211
QBD. 33.

By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 20, at the election of members of a local board of health persons are entitled to vote either as ratepayers or owners of property in the district, or as both; . . . but "no owner shall be entitled to vote as such unless, fourteen days at least previously to the day of tendering his vote, he shall have delivered to the clerk a statement in writing of his name and address, and containing a description of the nature of his interest in the property giving the qualification."

By s. 24, "any person entitled to vote may nominate for the office of member of the local board himself (if qualified to be elected), or any other person or persons so qualified (not exceeding the number of persons to be elected); and every such nomination shall be in writing, and shall state the names, residences, calling or quality of the persons nominated, and shall be signed by the party nominating."

At an election of members of a local board of health, several persons were nominated in September, 1871; one of the candidates was nominated by M.; and

the nomination paper was signed by M., "being duly qualified as owner in the district." M. had sent in the notice required as owner fourteen days before the election in 1870, and had not sent in a notice since; but he was still qualified in respect of the same property as owner. He was also qualified to vote as a ratepayer:—

Held, that in order to be entitled to vote as owner, the notice required must be sent before each election, and the nomination by M. as owner was therefore bad; but that, as the statute did not require any particulars of qualification, but only the signature of the person nominating, "as owner," might be rejected as surplusage, and, M. being qualified as ratepayer, the nomination was good.

At the election of four members of the local board of health for the district of Sheerness, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), seven candidates were nominated on the 15th of September, 1871. John Cole and others of the candidates were nominated by A. W. Marks. The nomination paper, after giving the names, residences, &c., of the persons nominated, as required by s. 24, had at the foot of it—"I, being duly qualified as owner in the district, nominate the above to be members of the local board. A. W. Marks."

Marks had sent in the notice required of him to entitle him to vote as owner, under s. 20 (1), fourteen days before the election

(1) By 11 & 12 Vict. c. 63, s. 20, at every election of a local board, "the ratepayers in respect of property in the district or part of a district for which the election is held and the owners of such property shall be entitled to vote according to the scale following; . . . and any person who is owner, and also bona fide occupier of the same property, shall be entitled to vote both in respect of such ownership and of such occupation; and the votes shall be given, taken, collected, and returned according to the directions hereinafter contained; and the majority of the votes actually collected and returned shall be binding on the district or part of the district for which the election is held; and whosoever shall not vote or shall not comply with such directions shall be omitted in the calculation of votes, and be deemed to have had no vote: Provided always . . . [Then follow definitions of

owner and ratepayer]; and no owner whatsoever shall be entitled to vote as such, unless, fourteen days at least previously to the day of tendering his vote, he shall have delivered to the clerk a statement in writing of his name and address, and containing a description of the nature of his interest or estate in the property giving the qualification," . . .

By ss. 21, 22, 23, the chairman of the local board is to conduct the election, and is to have power to inspect the rate-books, and may cause an alphabetical list to be made of the persons entitled to vote at the election, and is to give notice previously to the election.

By s. 24, "Any person entitled to vote may nominate for the office of member of the local board of health himself (if qualified to be elected) or any other person or persons so qualified (not exceeding the number of persons to be elected), and every such nomina-

1871

THE QUEEN
v.
MORGAN.

1871
THE QUEEN
v.
MORGAN.

in 1870, and his name was then entered on the register kept by the clerk of the local board. Marks had not sent in any notice since, but he was still qualified as owner in respect of the same property, and he was also qualified to vote as a ratepayer.

The voting papers were sent out on the 26th September and collected on the 29th of September; and the chairman afterwards (under s. 27) declared that four persons were elected, George Morgan being one; and that Cole (although he had a majority of votes over Morgan) was not elected, on the ground that his nomination was void, Marks not being entitled to vote as owner, by reason of having omitted to send in a notice.

On the above facts a motion was made on behalf of Cole, for a rule calling on Morgan to shew cause why an information in the nature of a quo warranto should not issue calling on him to shew by what authority he exercised the office of member of the local board of health for the district of Sheerness.

Nov. 4. *Michael*, in support of the motion, contended, first, that it was unnecessary to send in a notice before each election, when the owner had once been inserted on the register, and still remained qualified in respect of the same property. All that was necessary was that a notice should have been sent in fourteen days at least before tendering his vote; this had been done. Secondly,

tion shall be in writing, and shall state the names, residence, calling or quality of the persons nominated, and shall be signed by the party nominating, and be sent to the said chairman; and if the number of persons nominated shall be the same or less than the number of persons to be elected, such persons (if duly qualified) shall be deemed to be elected, and shall be certified accordingly by the said chairman under his hand; but if the number so nominated shall exceed the number to be elected, the said chairman shall cause voting papers, in the form contained in the schedule (A.) to this Act annexed, to be prepared and filled up, and shall insert therein the names of all the

persons nominated," . . . [Then follow directions as to sending out the voting papers.]

The form given in schedule (A.) contains columns for the initials of the voter, names, residence, and quality or calling of the persons nominated, and for the names and address of the nominators; and at the top has columns for the name and address of voter, number of votes, as owner, as ratepayer.

Sect. 25 has directions as to filling up the voting paper by the voter, and s. 26 as to the collection of them; and s. 27 defines the duties of the chairman as to examining the voting papers and the validity of the votes, and declaring the persons elected, &c.

if not entitled to vote as owner, Marks was qualified as ratepayer, and the nomination of Cole was therefore valid. The statute gave no form of nomination paper, and s. 24 only required that the nomination paper should be signed by the person nominating; no particulars were required; "as owner" therefore was mere surplusage, and might be rejected.

1871
THE QUEEN
v.
MORGAN.

THE COURT (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.) were of opinion that the statute clearly required a notice to be sent in before each election, fourteen days at least before tendering a vote, in order to entitle a person to vote as owner; and they refused the rule on the first ground, but granted it on the second.

Nov. 20. *Merewether* shewed cause. The nomination of Cole was bad. The statute, no doubt, gives no form of nomination paper, and does not in terms require any particulars to be stated as to the nominator; but a form of voting paper is given in Sch. (A.), which requires the voter to state whether he votes as owner, ratepayer, or both. Now nominating is equivalent to voting, if the number nominated do not exceed the number to be elected, as was pointed out by Lush, J., in *Reg. v. Parkinson* (1); and the same particularity therefore ought to be required in a nomination paper as in a voting paper. The nominator, therefore, having claimed to nominate "as owner," "as owner" is material, and cannot be rejected as surplusage. The chairman having rightly determined that Marks was not qualified as owner, why should he be put to the additional trouble of inquiring whether Marks is qualified as ratepayer, when he does not claim as such?

Michael was not heard in support of the rule.

COCKBURN, C.J. The rule must be made absolute, as we are of opinion that the nomination of Cole was valid. There is nothing in s. 24 which requires that the party nominating should state in what respect he is qualified: it only requires that he should be entitled to vote; but the same section does require that the nomination paper shall state certain particulars as to the persons nominated, and we must take it, that there would have been an express provision, if the legislature had thought it necessary that anything

(1) Law Rep. 3 Q. B. at p. 12.

1871

THE QUEEN
v.
MORGAN.

beyond the name of the person nominating should appear on the nomination paper, and that his qualification should be also stated. It is said that a nomination operates as a vote, and that the same particularity ought to be required in the nomination paper as in the voting paper. It might have been desirable that this should be so. All we can say is, the legislature has not said it. Then the amount of trouble to the returning officer is urged—that if the nominator be stated to be owner, and he be not so qualified, the officer must also look at the rate-book. But if the first proposition, that no qualification need be stated, be sound, in every instance the returning officer may have to search to see whether the nominator be qualified either as owner or ratepayer. The statement “as owner” therefore imposes no hardship, inconvenience, or additional trouble. In the present case, therefore, although the nominator has gone out of his way to put in “as owner,” he is qualified as a ratepayer, and I think the statement may be rejected as surplusage, and that there was nothing in the statement to dispense with the duty of the chairman to ascertain whether the nominator was qualified as ratepayer, and, if he was, to receive his nomination, and act upon it as valid.

MELLOR, J. I am of the same opinion. There would have been some foundation for the argument that the nomination paper ought to state the qualification, and therefore that the words “as owner” were material, if the statute had left it wholly blank as to what should be the form of the nomination paper; but it proceeds to state what particulars shall be inserted, and then as to the nominator only mentions his signature; and moreover the statute imposes certain conditions and gives a form of voting paper, whereas it gives no form beyond what the section requires as to the nomination paper. The argument, therefore, that the particulars of qualification of the nominator ought to be inserted is excluded.

LUSH and HANNEN, JJ., concurred.

Rule absolute.

Attorneys for relator: *Brooke & Chapman, for Mole, Sheerness.*
Attorney for defendant: *A. Scott Lawson.*

WILSON v. NEWBERRY.

1871

Nov. 17.

Negligence—Action—Pleading—Insufficiency of Declaration.

Declaration, that the defendant was possessed of yew trees, the clippings off which he knew to be poisonous, and that it was the duty of the defendant to prevent the clippings from being placed on land not occupied by him: that the defendant took so little care of the clippings that the same were placed upon land not occupied by him, whereby the horses of the plaintiff were poisoned:—

Held, on demurrer, that the declaration disclosed no facts from which a duty could be inferred in the defendant to take care of the clippings.

Fletcher v. Rylands (Law Rep. 3 H. L. 330), distinguished.

DECLARATION, that the defendant was possessed of certain yew trees, then being in and upon certain lands of the defendant, in his occupation, the clippings off which said yew trees were, to the knowledge of the defendant, poisonous to horses and cattle; whereupon it became and was the duty of the defendant to take due and proper care to prevent the said clippings off the said yew trees from being put or placed in and upon land other than land of the defendant, or in his occupation, where the horses and cattle of his neighbours and others might be enabled to eat them, and the plaintiff says that the defendant, disregarding his duty in that behalf, did not take due and proper care to prevent the said clippings off the said yew trees from being put and placed in and upon land other than land of the defendant or in his occupation, where the horses and cattle of his neighbours and others might be enabled to eat them, but, on the contrary, took so little, bad, and improper care of the said clippings off the said yew trees, that the same were put and placed in and upon land other than land of the defendant, or in his occupation, whereby the horses of the plaintiff being upon land where they lawfully might be, were enabled to eat the said clippings off the said yew trees, and did eat of the same, and were thereby poisoned and killed, whereby the plaintiff lost the value of the said horses, and has been otherwise damaged.

Demurrer, and joinder in demurrer.

Herschell, in support of the demurrer. The declaration is bad. The duty alleged does not follow from the facts stated in the

1871

WILSON
v.
NEWBERRY.

declaration. It does not charge that the defendant put the yew tree clippings on the land of the plaintiff. It does not appear who clipped the yew trees. A trespasser may have clipped the trees, and by his act the clippings may have been placed at the spot where they were eaten by the plaintiff's cattle. This case is distinguishable from *Fletcher v. Rylands*. (1) That case decided that the person who, for his own purposes, brings on his land and keeps there any thing likely to do mischief, must take care of it at his peril, and is answerable for the natural consequences of its escape. That doctrine has no application here.

Quain, Q.C. (*A. L. Smith* with him), *contra*. The declaration is good. This is an action for negligence, and by the demurrer the negligence is admitted, and the admission of negligence discloses a cause of action to be tried by a jury. The declaration charges not an absolute duty to take care of the clippings, but only a duty to prevent them from getting off the defendant's land. The plaintiff is entitled to succeed on the principle laid down in *Fletcher v. Rylands*. (1) The defendant had poisonous matter on his land, which he is bound to take care of, and he is liable to make compensation for the damage caused by its escape.

Herschell was not heard in reply.

MELLOR, J. I am of opinion that this declaration is bad. The duty alleged does not result from the facts stated. The facts upon which this duty is said to be founded are these: the defendant was possessed of certain yew trees then being in and upon certain lands of the defendant in his occupation, the clippings off which yew trees were, to the knowledge of the defendant, poisonous. These are the only facts from which the duty charged is to be inferred, and it is alleged in the following terms:—"Whereupon it became and was the duty of the defendant to take due and proper care to prevent the said clippings off the said yew trees from being put or placed in and upon land other than land of the defendant, or in his occupation, where the horses and cattle of his neighbours and others might be enabled to eat them." Now, it is not alleged that the defendant clipped the yew trees; it is not alleged that he knew the yew trees were clipped; and it is not alleged that he had

(1) Law Rep. 3 H. L. 330.

anything to do with the escape of the yew clippings on to his neighbour's land. It is quite consistent with the averments of this declaration that the cutting may have been done by a stranger without the defendant's knowledge. I cannot think that the duty charged can be deduced from the facts stated; and therefore, in my opinion, the declaration is bad.

The case of *Fletcher v. Rylands* (1) has no analogy to this case. The foundation of the doctrine there laid down is derived from an old case in *Salkeld* (2), in which it was determined that it was the duty of a man to keep his own filth on his own ground. If a person brings on to his own land things which have a tendency to escape and to do mischief, he must take care that they do not get on to his neighbour's land. This is a very different proposition from that which has been contended for on behalf of the plaintiff; it is that where a person has yew trees growing on his land which are clipped by some means, he must prevent the clippings from escaping on to his neighbour's land, and from being placed there by a stranger. I do not think that the facts alleged cast any duty of this kind upon the defendant.

LUSH and HANNEN, JJ., concurred

Judgment for the defendant.

Attorneys for plaintiff: *Plews & Irvine.*

Attorneys for defendant: *Reed, Phelps, & Sedgwick.*

(1) Law Rep. 3 H. L. 330.

(2) *Tenant v. Goldwin*, 1 Salk. 360.

1871
WILSON
v.
NEWBERRY.

1871

BAILEY v. FINCH.

Nov. 22.

Bankrupt—Set-off—Equitable Claim on Fund sought to be set off—Executor.

206,31
2d Div
495, - 8,501

A banking firm stopped payment in July, 1870, and were at once adjudged bankrupt. At the time of the stoppage defendant had an account with the bank, which he had overdrawn about 300*l*. At the end of 1869 a Mrs. A. had died, appointing defendant sole executor of her will, and leaving a balance of about 600*l*. in the hands of the bank. This balance was at once transferred by the bank from the account of Mrs. A. to the account of defendant, "executor of the late Mrs. A." In the interval before the stoppage defendant had drawn out about 200*l*. of this account, and paid in about 100*l*., leaving a balance in defendant's favour of about 500*l*. The defendant was left sole residuary legatee by Mrs. A.'s will. There were several pecuniary legacies which defendant had paid at the date of the stoppage of the bank; but there was a sum of 800*l*. to be invested for the benefit of certain persons, and an annuity of 100*l*. charged on the real and personal estate; and at the date of the bankruptcy defendant had not specifically provided for these two bequests; but there were in the hands of defendant, besides the balance in the bank, other personal assets of the testatrix; and after providing for these bequests, there would have been a surplus of 1900*l*., to which defendant was entitled as residuary legatee.

The plaintiff, as trustee of the bankrupts' estate, having brought an action against defendant to recover the amount of his overdrawn account, defendant sought to set off the balance in his favour on the executorship account:—

Held, that the transfer of the balance of the deceased's account to the account of the defendant, as executor, was equivalent to defendant drawing out the whole amount and paying the same amount into a fresh account, and created a personal debt for money lent between defendant and the bank; that the effect of it being opened as an executorship account was to affect the bank with notice if there were any equities attaching to the fund; but that under the circumstances there were no such equities as to prevent defendant treating the balance as a fund to which he was beneficially as well as legally entitled; and that, consequently, defendant was entitled to set it against the plaintiff's claim.

DECLARATION by plaintiff, as trustee of the estate of R. A. Kerrison and R. Kerrison, bankrupts, for money lent by the bankrupts to defendant, and interest, and on accounts stated between the bankrupts and defendant.

Pleas: 1. Never indebted. 2. Payment. 3. Set-off for money lent, money had and received, and on accounts stated between the bankrupts and defendant. Issue thereon.

At the trial, before Kelly, C.B., at the Norfolk spring assizes, 1871, the following facts were taken as agreed: The plaintiff is the trustee under the bankruptcy of the persons named in

the declaration, being the banking firm of Harveys & Hudsons, of Norwich, who stopped payment on the 16th of July, 1870; a petition was presented the same day, and they were adjudged bankrupt on the 22nd of July. The defendant was a customer of the bank, having three several accounts, two of which he had overdrawn, and on the other there was a balance in his favour, and on the aggregate of the three accounts there was, at the time of the stoppage, a balance against him of 285*l.* 10*s.* 11*d.*; and the plaintiff, as trustee under the bankruptcy, sought to recover this balance and interest, amounting together to 292*l.* 17*s.* 11*d.*

1871
BAILEY
v.
FINCH.

The defendant claimed a balance or set-off in his favour under the following circumstances:—A Mrs. Alexander, a customer of the bank, died on the 1st of December, 1869, leaving the defendant sole executor of her will and sole residuary legatee. At her death there was a balance standing to her credit of 654*l.* 2*s.* 9*d.*, and the defendant having satisfied the bank of his title under the will, the balance was at once transferred from the account of Mrs. Alexander to an account headed, “The executor of the late Mrs. Elizabeth Alexander, Mr. Jacob Finch, in account with Messrs. Harveys & Hudsons.” The first item on the credit side being—“1869. Dec. 1. Balance, 654*l.* 2*s.* 9*d.*” Between December, 1869, and the stoppage in July, the defendant had drawn several cheques on the account to the amount of 217*l.* 18*s.* 4*d.*, and had paid into the account different sums to the amount of 105*l.* 19*s.* 1*d.*, leaving, with 5*l.* 0*s.* 10*d.* interest, a balance in his favour of 547*l.* 4*s.* 4*d.*

Mrs. Alexander’s will was proved on the 11th of June, 1870, and the personalty sworn under 6000*l.* There were certain pecuniary legacies which the defendant had paid; but there was a legacy of 800*l.* devised to the defendant and another person, in trust for certain parties, and an annuity of 100*l.* for the life of M. A. Laughton charged on the real and personal estate, and for neither of these bequests had the defendant specifically provided at the date of the bankruptcy; but there were in his hands other personal assets besides the balance in the bank, and after providing for the above two bequests there remained a surplus of 1900*l.*, to which the defendant was entitled as residuary legatee.

A verdict was taken by consent for the plaintiff for 292*l.* 17*s.* 11*d.*,

1871

BAILEY

v.

FINCH.

leave being reserved to move to enter a verdict for the defendant, the Court to be at liberty, if necessary, to draw inferences of fact.

A rule was accordingly obtained to enter the verdict for the defendant on the plea of set-off, on the ground that the facts proved that plea.

Nov. 15 and 22. *O'Malley, Q.C.*, and *Merewether*, shewed cause. The defendant is sued for the balance of his private account, which he had overdrawn; and he seeks to set off in some way or other the balance standing to his credit as executor. This he cannot do at law, as they are in different rights.

[BLACKBURN, J. Is that so? As between him and the bank, the money standing to his credit in the executorship account is his.]

The bank have notice that it is a trust account; and, although it must be conceded that, if the testatrix's estate had been wound up, there would have been a surplus coming to the defendant, as residuary legatee, yet, at the time of the bankruptcy, this had not been done; there were legacies outstanding, and therefore the balance in the bank was saddled with an existing trust. In *Bishop v. Church* (1) the circumstances were very similar to the present; the plaintiff was executrix and residuary legatee; a person, indebted by bond given to the testator, had become bankrupt, and the executrix, being indebted to him in her private account, sought to set off his debt to the testator. Lord Hardwicke, C., refused to allow the set-off, on the ground that it would necessitate the taking of an account to ascertain whether there was a surplus.

[BLACKBURN, J. There the debt sought to be set off was due to the testator, that is not so here, this debt is a legal debt due to the defendant.]

In *Freeman v. Lomas* (2), Turner, V.C., adopts the same view, and says that even the admission that there are assets and a surplus would not get rid of the difficulty in principle.

[BLACKBURN, J. It was there attempted to make out an equitable set-off, but here there is a set-off at law, and it is only the equity of third parties which interferes. What equity is there in the bank?]

They would be restrained in equity from allowing the defendant

(1) 3 Atk. 691.

(2) 9 Hare, 109, 114; 20 L. J. (Ch.) 564.

to pay his private debt out of the trust fund. This was precisely what was decided in *Ex parte Kingston*. (1) The legal property of the defendant in this fund was as executor, not in his personal capacity. Suppose he had died intestate, who would have had to sue for the balance? Clearly the representatives of Mrs. Alexander, not of the defendant: *Elliott v. Kemp*. (2) * *Farr v. Newman* (3) shews that property of a testator in the hands of an executor cannot be dealt with as though it were the executor's private property, so as to be made to pay his private debts. *Pedder v. Preston* (4) is an authority that, where there are several accounts in the name of the same person in the same bank, they cannot be treated as one, unless the rights on each are precisely the same.

Field, Q.C., and *Bulwer, Q.C.*, in support of the rule. It is a fallacy to say that this was money due from the bank to the defendant as executor; had the balance remained standing to the credit of Mrs. Alexander, the case might have been altogether different; but here the balance had been transferred to the defendant, and he had drawn out and paid in sums to his own account; it was therefore a personal debt between him and the bank, just as much as his other accounts, although for convenience headed as "executor." If the bank had refused to cash cheques of the defendant drawn on this account, he might and must have sued in his personal capacity and not as executor; or if he had overdrawn the account, the action would have been against him in his personal capacity and not as executor. There was, therefore, a right of set-off under 2 Geo. 2, c. 22, or, at any rate, mutual credit under the Bankruptcy Act.

[BLACKBURN, J. The bank had notice that it was an executorship account, and if the legatees interfered they would have had an equity.]

No doubt; but no person interfered; and there was really no person who could interfere, as there was a much larger sum than was necessary for the payment of both the outstanding bequests; and if the aid of a court of equity had been invoked, they would have said, there is plenty of money in the defendant's hands, you cannot be affected by the defendant treating this money as part of

(1) Law Rep. 6 Ch. App. 632. (3) 4 T. R. 621.

(2) 7 M. & W. 306.

(4) 12 C. B. (N.S.) 535; 31 L. J. (C.P.) 291.

9 June 1875. 496

1871

BAILEY
v.
FINCH.

1871
BAILEY
v.
FINCH.

the surplus to which he is beneficially entitled. In order that a court of equity should interfere to prevent such an appropriation, there must be a clear case that the party would be prejudiced: see 2 Story's Equity Jurisprudence, § 1436. So far from equity being on the side of the plaintiff, it would be the grossest injustice to refuse to allow this set-off; it would be to pay the bank's debts with the defendant's money, and contrary to all the cases at law or equity. *Forster v. Wilson* (1) is in principle precisely analogous to the present case; there the customers of a bankrupt bank, who had overdrawn their account, were held entitled to set off the amount of the notes of the bank which they held in payment of debts of their customers, but not of those which they held only as trustees for others. The object of any resort to a court of equity is to do substantial justice between all the parties: *Bodenham v. Hoskins* (2) is a good illustration of this.

[MELLOR, J., referred to Chitty on Contracts, 9th ed. pp. 789-90, where it is said, "It has been held that in an action by a mere trustee, the defendant may set off a debt due to him from the party who is beneficially entitled to the money sought to be recovered," citing *Bottomley v. Brooke*. (3)]

Merewether asked leave to cite in addition, *Medlicot v. Bowes* (4) and *Gale v. Luttrell*. (5)]

COCKBURN, C.J. This rule must be made absolute. The plaintiff, as trustee of Hudsons & Harveys' Bank, at Norwich, who had become bankrupts, brings this action against the defendant, to recover a balance due from the defendant upon three accounts, which he kept with the bank in his private and personal capacity. There is no doubt, that upon those three accounts, there being upon one a balance in his favour, and on the other two a balance against him, there was upon the whole a balance against him, which the trustee of the bank now seeks to recover. The question is, whether the defendant can set off against this demand a balance which stands to his credit upon an account opened by him at the bank as executor of a person deceased, named Alexander. We

(1) 12 M. & W. 191.

(3) M. 22 Geo. 3, C. B., given in

(2) 21 L. J. (Ch.) 864; S. C. on 1 T. R. at p. 621.

Appeal, 2 De G. M. & G. 903.

(4) 1 Ves. Sen. 207.

(5) 1 Y. & J. 180.

are of opinion that he is entitled to set off the balance standing to his credit upon the executorship account.

1871

BAILEY

v.

FINCH.

There can be no doubt that in point of law the estate and effects of the deceased testatrix passed to the defendant as executor. And although it may be for his convenience to open an account in his own name as executor instead of in his own name as a private customer, the whole effect of that is, I apprehend, to affect the bank with the knowledge of the character in which he holds the money. Therefore, if there were persons beneficially interested in that fund, the bank might be liable to be restrained by proceedings in equity from dealing with the fund as if it were one in which their customer, the defendant, were beneficially interested, absolutely, without reference to any trust or beneficial interest to which it was subject. But as between the bank and him, I take it that the position of the defendant's counsel is perfectly impregnable, that he might recover the money so placed in their hands, although it was in form an executorship account, upon an ordinary money count, without any reference to his character as executor. But if there were any parties beneficially interested, it might be that the bank would be entitled to say, "Those persons having an interest in the fund, we should be restrained by a court of equity from dealing with that fund as though it were yours absolutely and exclusively, and therefore you would not be entitled to set that balance off against the private debt which you owe to us in your personal capacity." It might very well be that, if in the present case there had been any persons so beneficially interested, the bank might have ground for denying the right of the defendant to set off the debt due to him from the bank on this executorship account. But it appears an admitted fact in the case, that, upon the statement of the executorship accounts, there is no one who can have in any possible view of the case, either at law or in equity, any claim upon this fund. The estate of the testatrix is amply sufficient to satisfy all the claims on the executor with respect to the requirements of the will, and to leave a large residuary fund in his hands. Therefore as to the fund in the hands of the bank upon this executorship account, we must take it as a clear and admitted fact that the defendant was entitled to it as the residuary legatee under the

1871

BAILEY

v.

FINCH.

will. He had other means of satisfying, and out of those other means would have satisfied, all that anybody had a right to claim to have under the will. This fund, therefore, is one in which he, and he alone, was beneficially interested; and there is no equity whatever to be put in force in respect of it. It stood divested of all equitable claims upon it; it stood simply as money of the deceased, which passed into the hands of the executor, and had become the property of him as an individual.

It seems to me, therefore, that the bank would have had no answer to an action brought by the defendant to recover this fund which he had deposited with them, which, as the executor of the deceased, had become his, subject to the equitable rights which legatees or other persons would have had to enforce against him. It therefore follows that he can set it off against the claim made by them upon the other accounts, which he had opened with them under the other heads of account. It seems to me, therefore, to follow from this state of things that the defendant would have been entitled to recover this sum from the bank, if they had not become bankrupt; therefore he is still entitled to set it off against the claim made by the trustee against him.

BLACKBURN, J. I am of the same opinion. As it is a question between the trustees in bankruptcy and another person, the whole matter must depend upon what the facts were at the time of the bankruptcy; and though the evidence necessary to ascertain those facts has been given since, what we have to look to is, what were the facts at the time of the bankruptcy; and the rights of the parties must be regulated by what those facts were. It appears that at that time Mr. Finch, the defendant, had an account with the bank, or rather several accounts, which for convenience he had called by different names; it matters not what they were, he had for convenience three accounts. There is no doubt whatever, as between him and the bank, those three accounts all formed in reality one account; and that a debt was owing by him to the bank upon those three accounts, being the balance of the whole three taken together. That would have been independent of any question of set-off and mutual credit between them. Now, that being the case, several months before the bankruptcy took place the

defendant became executor of a Mrs. Alexander. At her death, Mrs. Alexander had in the bank a balance of 654*l.* 2*s.* 9*d.* owing to her. We have, first, to consider what happened then, and what was the legal effect of it. Mr. Finch then called on the bank to open an account with him, which is headed "Executor of the late Mrs. Alexander in account with Messrs. Hudsons & Harveys.—Mr. Jacob Finch." The account was opened in that way, and the first item of the account was that this balance was transferred to the credit of Mr. Finch from the testatrix's account, which was now closed. That was to all intents and purposes a payment of the debt which they owed to the testatrix, and would amount to a loan of that sum of 654*l.* by Mr. Finch to the bank. It matters not that the money was the same, as far as that goes. That account was opened in his own name, Mr. Jacob Finch; and if that account had been overdrawn an action would have lain against Mr. Finch, not as executor, but against him personally. It was a personal contract between him and the bank. It was in December when the balance was transferred, and that was the legal effect of it. This account was operated upon during the seven months from December till the bankruptcy, by the defendant paying in sums amounting to 105*l.* on one side, and drawing out on the other more than 200*l.*, so that the balance on that account at the time the bankruptcy took place was 547*l.* 4*s.* 4*d.* Now, the fact that the defendant had opened it in the books as an executor's account did not operate at all in preventing it being Mr. Finch's private account, and the amount of it a debt, as money lent by Mr. Finch to them; but it did operate as notice to them, as a statement to the bank—"This account which I am opening is not my own unlimited property, but it is money which belongs to the estate which I am administering as executor; consequently, there may be persons who have equitable claims upon it." The bank would have been bound by any equity which did exist, of which they had notice at the time the bank became bankrupt. Supposing the bankruptcy had not intervened—supposing the bank had continued *sui juris*—if the bank had sued the defendant for the balance on the three private accounts, there would have been at law a complete answer on his part. I do not know that it would have been necessary to have recourse to a statutory set-off, because, as

1871
- -
BAILEY
v.
FINCH.

1871
BAILEY
v.
FINCH.

there were four different accounts opened by one and the same person with one and the same bank, the facts would shew that, striking the balance of the whole of them, there was no debt at law due from Mr. Finch to the bank. But I think it is clear, that if the bank had sued Mr. Finch, and he had set up this defence, and said, "This 547*l.* shall be applied so as to prevent my being obliged to pay you money, and you shall pay yourselves out of it;" or if the bank had endeavoured to pay themselves out of it (which would be the more likely case, in the possible event of Mr. Finch being insolvent), then, I take it, in either case, any person who had a beneficial interest in the testatrix's estate might have intervened, and said, "The bank had notice that this was a trust fund, I have a right to call upon a court of equity to interfere to prevent my money being taken to pay Mr. Finch's private debt;" and, as far as his interest went, but no further, I think he would have had a right to say this. In the case of *Ex parte Kingston* (1) a separate account had been opened under the head of "Police Account," and the balance upon that stood at about 2609*l.* in favour of Mr. Gross at the time he became bankrupt. It was proved that Mr. Gross was indebted to the county on this police account 2433*l.*, an amount somewhat less than the balance standing to his credit on the police account, between 100*l.* and 200*l.* less. The order of the Lords Justices on the contested point was, that, there being notice given that this account was police account, there was notice that the county had a beneficial interest; and it was against equity to let the bank set up their claim to hold this, so as to pay off the private debt of Mr. Gross to them with county money. Therefore, as far as the 2433*l.* the order of the Lords Justices on appeal was, that that sum should not be set off; the county must have it. But as to the surplus—the 100*l.* odd—(though that does not distinctly appear from the report), the order was, that the bank was entitled to that surplus. The decision therefore was, that as far as the beneficial interest was not in the bankrupt, the people in whom the beneficial interest really was, viz., the county, had an equity to interpose and prevent a set-off; but as regards the surplus, there was no such equity, the bank had a right to take the surplus. (2)

(1) Law Rep. 6 Ch. App. 632.

(2) The original order made by the

county court judge was in favour of the claim of the bank. On appeal

The same would be the case here. Here, the facts at the time of the bankruptcy, though ascertained subsequently, are that the personal estate amounted to something like 6000*l.*, and that the whole of the outstanding matters not yet settled were a legacy of 800*l.*, and an annuity of 100*l.* a year, and that the funds in the hands of the defendant were sufficient to meet these two charges and leave 1900*l.* residue. Consequently the defendant, who was residuary legatee, really had a surplus beneficial interest—a very considerable one—after he had provided for both those bequests. It is quite true that the legatee and the annuitant both had an equitable lien over this money in the bank, as well as over the other assets which were not in the bank. I am inclined to think that there would be an equity on the part of the defendant to compel the legatees, who had a lien over both of those funds, to pay themselves out of the money as to which there were no proceedings, out of the pure and simple moneys, and to leave the other quite untouched. Whether there was such an equity or not to compel them to do it, it is perfectly plain that they would be at liberty to do it. It is equally plain that it would be greatly for their benefit to be paid in full instead of having a mere claim to so many shillings in the pound as dividend; and it is quite clear to me that they would take that course. Then, if that be so, the amount that remained in the bank was substantially and completely the property, beneficially, in equity, of the defendant Mr. Finch; and if the parties had remained *sui juris* there would be no equity to interfere to prevent his relying upon the legal right he had to consider this as part of one debt with the other matters, and so to say he was not indebted at all. Or possibly the way in which it would shape itself would be to rely upon the Statute of Set-Off, and to say these were cross-debts, set one against the other, there being no equity to interfere with the defendant's legal interest.

Then comes the question whether the fact of the bankruptcy having intervened made a difference. The rule of mutual credit,

1871

— BAILEY
v.
FINCH.
—

the Chief Judge discharged the order, and ordered the balance standing in the police account, to the extent of Gross's debt to the county, viz. 2433*l.*, to be

paid to the county; and this latter order the Lords Justices affirmed on appeal.

1871

BAILEY
v.
FINCH.

in my opinion, is not at all dependent upon the Statute of Set-Off. There is a learned account of it in Mr. Christian's book on Bankruptcy (1), in which he makes out, according to his view, that as early as the time of Elizabeth this rule was adopted; and where an order was made under the Statute of James I., assigning a debt to assignees, an account would be previously stated. That rule, having been adopted as early as under the Statute of Elizabeth, was always acted upon. I have an impression that I have somewhere seen, I cannot find the reference, a very early order in Chancery of Lord Nottingham (2) to that effect. At all events, Mr. Christian cites the authority of Lord Chief Justice North in 1675, quoted, as he says, by Serjeant Goodinge: "If there are accounts between two merchants, and one of them becomes bankrupt, the course is not to make the other, who, perhaps, upon stating the accounts is found indebted to the bankrupt, to pay the whole that originally was intrusted to him, and to put him, for the recovery of what the bankrupt owes him, into the same condition with the rest of the creditors; but to make him pay that only which appears due to the bankrupt on the foot of the account; otherwise it will be of accounts between them after the time of the other's becoming bankrupt, if any such were." (3) That was in 1675. Again, in another case, quoted from 2 Vernon: "In the case of a bankrupt, adjudged by the Lord Chief Justice Hale, that where there were dealings on account, a man should not be charged with the account on the credit side, and be put to come in as a creditor for the debts owing to himself, but should only answer to the bankrupt's estate the balance of the account." (4) Now, those two cases, before the Revolution, and before

(1) 1 Christian's Bankrupt Law, 2nd ed. pp. 499-500.

(2) The reporter has been unable to find any reported order of Lord Nottingham to the effect mentioned. But in *Curson v. African Co.* (1 Vern. 121) there is an order somewhat to that effect by Lord Guildford, who became Lord Keeper, on the death of Lord Nottingham, C., in 1682. The earliest reference to this subject in the reports which the reporter has been able to find is in *Powel v. Stuff* (2 Bulst. 26), 10 Jac. 1 (1612),

which was an action on the assignment of a debt under the Statute of Bankrupts (1 Jac. 1, c. 15, s. 13) by a creditor of a bankrupt; and Flemming, C.J., is reported to have said, Croke, J., agreeing with him, "If the plaintiff had been in debt in as great a sum as the bankrupt was indebted unto him, and yet his debt assigned, this assignment had not been good."

(3) *Anonymous*, 1 Mod. 215.

(4) See *Chapman v. Derby*, 2 Vern. 117.

there had ever been a Statute of Set-Off, shew that at that time the most equitable principle was adopted that the cross accounts should be set off one against the other, and that the balance only should be proved. That was enacted in the statute of 4 Anne, c. 17, s. 11, was continued afterwards in the other statutes, and is continued now. It existed long before there was a Statute of Set-Off at all. (1) The principle was stated in *Forster v. Wilson* (2), that the Court in settling the debts of a bankrupt would take into account equitable claims, equity as well as law. It would be positively most unjust, and quite contrary to law to say that the cross debts, which, though equally due between the same parties, in truth belonged to different persons, might be set off one against the other. Consequently where the whole beneficial interest is in another person, it cannot be set off to the mutual credit; one cannot be set off against the other. And though it is true that a person, who has got a beneficial interest, and has not yet given it over before bankruptcy, could not afterwards give it over, yet, I cannot think that the doctrine of equitable lien could be carried to such a monstrous conclusion as that, in circumstances like the present,—where a person has an equitable lien over a particular fund, and does not in the slightest degree benefit or lose by the fund being paid over to another, and that other who has got the legal estate will have the whole benefit or the whole loss, according as it be proved or not, so that he is really the person beneficially interested in the fund,—the existence of the equitable lien should interfere to prevent his being able to set off the fund against a debt of his own. I cannot think there is any principle which goes so far as to say, that the fact that there is some person who has an equitable lien should be brought in so as to prevent the set-off. The cases which have been referred to do not seem to me authorities to that extent. It seems to me to be clearly against principle. Therefore I come to the conclusion, as to this money, which at the time of the bankruptcy was legally in the defendant, and not also equitably only because some other persons had a small claim on it, that he is fully entitled to bring it into the account with the bank. Consequently the balance should have

1871
BAILEY
v.
FINCH.

(1) The Statutes of Set-Off are 2 Geo. 2, c. 22, s. 13; 3 Geo. 2, c. 24, ss. 4, 5.

(2) 12 M. & W. at p. 204.

1871
BAILEY
v.
FINCH.

been found in his favour. Therefore the defendant ought to have the verdict, and the rule should be made absolute.

MELLOR, J. I am entirely of the same opinion. Mr. O'Malley's contention was that so long as the annuity of 100*l.* a year had not been provided for it was impossible that the defendant could have any right to the money so as to be able to set it off, I mean, to set it off, in common parlance, against the claim of the bank. I think that involves a fallacy. It appears by the statement of the evidence on the Chief Baron's notes, that if the estate were wound up, there would be a balance of 1900*l.* in favour of the defendant, he being the residuary legatee as well as executor, and being beneficially entitled to all the estate which remained after providing for the bequests in the will. Now, I think I am entitled upon the evidence to find as a fact that that state of things, which it is said would now exist, and would now appear if the accounts were taken, did in fact exist at the time of the bankruptcy. And finding that it did exist at the time of the bankruptcy, and that the defendant had a beneficial interest in the assets to the extent of 1900*l.* at that time, the estate being of the value of 6000*l.*, I think that he was entitled beneficially to this money in the bank. That he was so in law, there can be no doubt, because he was entitled in law to sue for it in his own name, the legal title being in him; therefore, as he was both legally and beneficially interested, he was entitled to say, "I have a claim against you; although it is described as money due to me as executor, still I have a claim against you to set it against the balance on the three separate accounts which you have against me." On these short grounds I am of opinion that the verdict ought to have been for the defendant, and that the rule to enter the verdict for the defendant must be made absolute.

Rule absolute.

Attorneys for plaintiff: *Sole, Turner, & Turner, for Coaks, Norwich.*

Attorneys for defendant: *Whites, Renard, & Floyd, for Emerson & Sparrow, Norwich.*

THE VESTRY OF ST. MARY, NEWINGTON, APPELLANTS; JACOBS,
RESPONDENT.

1871
Dec. 11.

Highway—Right of Owner of Soil to access to his Property across a public Footpath—Highway Act (5 & 6 Wm. 4, c. 50), s. 72—Metropolis Local Management Act (18 & 19 Vict. c. 120), ss. 96, 98.

The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public, and may exercise all other rights of ownership not inconsistent with such dedication; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage and another part to another, does not deprive him at common law of any rights as owner of the land which are not inconsistent with the right of passage by the public; and the provisions of the Highway and Metropolis Local Management Acts, so far as they apply to roads and streets, are subordinate to the paramount rights reserved by the owner.'

The respondent was owner and occupier of premises contiguous to a public highway, several feet of the highway immediately adjoining to his premises being flagged pavement, which had been used as a footway for sixty years. The respondent's premises consisted of a warehouse, yard, and railway arches, with a gateway opening on to the pavement; the site had formerly been occupied by shops and houses; but, owing to the erection of the railway, was now unfit for houses. The respondent used the premises for the deposit of heavy machinery, &c; and he at first unloaded the machinery from the carriage or trolleys in the roadway, and moved it across the pavement by rollers and levers into his premises; but this took much time, and was objected to as causing a nuisance by the obstruction to the foot pavement. The respondent then applied to the appellants—who were the surveyors of highways under the Metropolis Local Management Act (18 & 19 Vict. c. 120), s. 96, and under s. 98 were empowered from time to time to cause the streets to be paved and the ground or soil to be raised or lowered,—for permission to take up the flags, and make a proper paved carriage access across the footway to his premises. This they refused. The respondent then conveyed his machinery across the pavement in the carriage or trolleys; and the weight crushed and injured the flags. Upon this the appellants took out a summons against the respondent under 5 & 6 Wm. 4, c. 50, s. 72, for doing damage to a highway. The magistrate dismissed the summons, "finding that the freehold premises in question could not be reasonably enjoyed without access across the existing footway, and that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare;" and he stated a case for the opinion of the Queen's Bench as to whether he was bound to convict:—

Held, that the magistrate was justified in dismissing the summons.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The appellants are the vestry of the parish of St. Mary, Newington, to whom, by s. 96 of 18 & 19 Vict. c. 120 (Metropolis Local

1871 155
14CLD
5403 D27

1871
ST. MARY,
NEWINGTON
v.
JACOBS.

Management Act), the powers and duties of surveyors of highways and the property vested in such surveyors are transferred. (1)

The respondent is the occupier of premises abutting towards the west on a highway in the parish called Newington Causeway, such highway consisting of a foot pavement and a roadway. The respondent's premises also abut on Tiverton Street on the east. Part of the respondent's premises are arches, over which is the London, Chatham, and Dover Railway; and adjoining the pavement is the dead wall of the railway arches extending about sixty feet along the pavement.

The respondent is the tenant of the railway company, and is for the purposes of this case to be treated as standing in the position of the railway company, the freeholders.

The footway of Newington Causeway is a flagged pavement about twenty-seven feet wide, and extending from King's Place to the corner of New Kent Road, having on that (the east) side only four roads or carriage ways intersecting it, namely, at Rockingham Street, at Mead's Place, the entrance to the Surrey Sessions House, and at Horsemonger Lane, all narrow ways. On the west side of the road facing Newington Causeway are many crossings and carriage ways, and that side is in the parish of St. George the Martyr, Southwark, and its use as a highway is not nearly so ancient as that of the east side. The causeway was originally a foot and bridle way.

Until the year 1865, when the London, Chatham, and Dover Railway was formed under parliamentary powers from Ludgate Hill to Victoria, there was one continuous and unbroken line of shops from Rockingham Street to the entrance of the Surrey Sessions House, such shops being used for the display of goods; within that distance there was no break of flag pavement, and no road for carriages and horses across it, there being no premises to which such access was required. The pavement for some length of time has been a promenade for the south side of London, and the keepers of shops abutting upon it have paid higher rates and rents in consequence of the very large number of purchasers frequenting it on foot.

(1) See also s. 98, as to the power of the vestry to pave and repair the streets, and to cause the ground to be raised or lowered.

For sixty years and upwards the inhabitants of St. Mary, Newington, wishing to have access to their premises across a footway, have always applied to the highway board, and, since that board has been abolished, to the vestry, for permission to do so; and there is no instance of a refusal recorded in the parish books, although there are entries of such concessions, upon terms.

The respondent became the tenant of the railway company in June, 1870, and subsequently by deed, dated the 21st of September, 1870, of the premises in question, which consist of a yard, building, and railway arches, with a gateway opening on to the pavement. In consequence of the railway arches and wall the premises are unfit for dwelling-houses, and they are used by the respondent as a deposit for new and second-hand machinery, engines, boilers, and other implements of the heaviest description, some single pieces weighing as much as seven or eight tons. Sometimes four, five, or six horses have been required to draw in the carriage or trolleys on which such pieces were placed; and it was impossible to turn a team of horses of that length from Tiverton Street into the premises of the respondent, so that practically the only access for such goods to his premises was across the pavement of Newington Causeway. At first the respondent instead of using horses for the purpose unloaded from the carriage or trolleys in the roadway at Newington Causeway, and by the aid of rollers and levers slowly moved the huge machinery, &c., across the pavement into his premises. This occupied much time, and caused an obstruction of the pavement which was alleged to be a nuisance, and was the subject of complaint by the shopkeepers aforesaid as injurious to their trade.

In the month of June, 1870, the respondent applied in writing to the appellants for leave, at his own expense, to take up the flag pavement in front of his gate, and to lay down paving-stones, so as to form a carriage entrance from the roadway to his premises, on the same level as the present flagged footway. The application was fully considered and discussed, and by a vote of the majority of the vestry was refused.

It was proved that in the months of November and December, 1870, the respondent proceeded to drive carriages or trolleys laden with machinery, across the pavement, and that by reason of the

1871

ST. MARY,
NEWINGTON
v.
JACOBS.



1871

ST. MARY,
NEWINGTON
v.
JACOBS.

extraordinary weight of the machinery, &c., the flags became broken and crushed, and damage had thereby been done to the pavement to the amount of 3*l.* 12*s.*

A demand of payment was made by the vestry clerk, and refused by the respondent. The respondent was then summoned under 5 & 6 Wm. 4, c. 50, s. 72 (1), for causing injury or damage to be done to the highway.

It was contended on the part of the respondent, that he was entitled to take goods into his yard or premises, and that to do this he must cross the pavement with them; that it occupied less time, and far less obstructed the traffic if he drew them across upon wheels and with horses; that the damage was not wilful, but a necessary result of the refusal of the board to permit him to replace the flags with hard materials, and that, therefore, he was not responsible under the summons.

On the part of the appellants this contention was traversed; and it was contended that there had been a special dedication by all the adjoining owners of land of this pavement, as a pavement for foot passengers only; and that as it had been acquiesced in for more than sixty years, all antagonistic rights of user had been forfeited and foregone by each individual freeholder; that the public had by undisturbed user for more than sixty years acquired an indefeasible right to have the pavement used as a footway only; and that it was not competent for the London, Chatham, and Dover Railway Company to let the land for the purposes in question, as it would create a public nuisance, and was in contravention of their statutory obligation requiring them to keep on one side of their line eight feet at least uncovered and unbuilt upon, and that the London, Chatham, and Dover Railway could not so use the land themselves.

The magistrate was of opinion that the injury or damage was not wilfully done to the highway; that the freehold property in question could not be reasonably enjoyed without access across the

(1) By 5 & 6 Wm. 4, c. 50, s. 72: "If any person shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot passengers; . . . or shall cause any injury

or damage to be done to the highway, or the hedges, posts, rails, walls, or fences thereof;" he is made liable to the penalty of 40*s.* over and above the damage occasioned.

existing footway, and that the rights of ownership and of the public might be jointly exercised there quite consistently with the general welfare; and he accordingly dismissed the summons.

1871
ST. MARY,
NEWINGTON
v.
JACOBS.

If the magistrate ought to have convicted the respondent, the case will be remitted to him to adjudicate upon.

Nov. 8. *Manisty, Q.C.* (*Clarke* with him), for the appellants. There can be no doubt that damage has been done and an offence committed within s. 72 of 5 & 6 Wm. 4, c. 50; unless the respondent's position as owner of the land gives him any rights which another, not in that position, would not have. But there can be no right in the landowner to drive carriages across land which he has dedicated as a footpath, such use being inconsistent with the dedication.

Metcalfe, for the respondent. From the statement in the case, it appears that there is practically no other access to the respondent's premises than across the foot pavement; and it is also found that the premises could not be reasonably enjoyed without this access; and that the rights of ownership and those of the public might be jointly exercised quite consistently with the general welfare. In other words, that the temporary obstruction of the footway by taking carriages across it is consistent with the original dedication of the land as a footpath; and if the vestry will not allow a proper carriage way to be made, the injury to the pavement is the result of their refusal. It may be that if the respondent constructed this carriage way without the leave of the vestry, he would be liable to proceedings for a nuisance: see *Rex v. Jones* (1); and *Reg. v. Longton Gas Co.* (2). But in both those cases it was assumed by the judges to be clear law, that a temporary obstruction of the footway for the purpose of the reasonable enjoyment of the adjoining premises was lawful.

Manisty, Q.C., did not reply.

Cur. adv. vult.

Dec. 11. The judgment of the Court (Cockburn, C.J., Mellor, and Hannen, JJ.) was delivered by

MELLOR, J. In this case the question submitted to us by the

(1) 3 Camp. 230.

(2) 2 E. & E. 651; 29 L. J. (M.C.) 118.

June 25. 601

1871

ST. MARY,
NEWINGTON
v.
JACOBS.

magistrate is, whether, upon the facts stated and found by him, he "ought to have convicted the respondent." We consider this question to mean, was he bound to convict the respondent?

We are of opinion that he was not so bound, and that he therefore was justified in dismissing the summons.

The appellants are the Vestry of St. Mary, Newington, who, under the provisions of the Metropolitan Local Management Act (18 & 19 Vict. c. 120) exercise the functions of surveyors of highways, and are, by s. 98 of that Act, entitled from time to time to cause the streets within their district to be paved and repaired, and to cause the ground or soil thereof to be raised and lowered.

The vestry, as surveyors of the highways, complained of the acts of the respondent as falling within s. 72 of 5 & 6 Wm. 4, c. 50, by "causing injury or damage to be done to the highway termed Newington Causeway." There is no doubt that, had the acts in question been done by a stranger, or by an ordinary passenger, they would have fallen within the section referred to, and in such case the appellants, in their character of surveyors of the highways within the parish, would have been the proper persons to prosecute the complaint. The respondent is, however, the owner of premises contiguous to Newington Causeway, and the acts complained of were done by him in the carrying on of his ordinary business in such premises, and upon that part of the footway which lies immediately in front thereof. The vestry had previously refused permission to the respondent to take up the flags and make a proper paved carriage access across the causeway to his premises, which premises he was in the habit of using for storing up machinery of a very weighty sort. The respondent, having applied the premises to this purpose, at first conveyed the machinery across the causeway by means of rollers and levers; but, this mode of proceeding necessarily occupying considerable time, it was objected to as causing an undue obstruction of the thoroughfare. Thereupon, as the only alternative to the entire abandonment of the use of the premises before referred to, which it appeared was the only use to which, owing to the peculiar character of the locality, they could be put, the respondent, in the exercise of his right as owner, adopted the course of conveying his machinery to and from his premises in trolleys or waggons across the flagged footway. It was in so doing:

that the damage was done which formed the subject of the present complaint.

The right of the respondent to do so depends upon the nature and extent of the rights acquired by the public over the footway in question, either at common law, or under the Highway Acts, or the Metropolis Local Management Act (18 & 19 Vict. c. 120).

The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership, not inconsistent therewith; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public.

If this were not so, the owner of a large estate, having dedicated a portion of his land to the use of the public as a roadway, and they, or the persons representing them, having raised a footpath on one side of such roadway for their own more convenient use thereof, would, after a lapse of time, be so bound by this convenient arrangement of such roadway as to be unable to open a new gateway or entrance to his land from such roadway, without being liable to be convicted under the provisions of the Highway Act. If this were really the law, the result would be most serious to owners who have dedicated, or may dedicate, roadways to the public; and in towns would, to a great extent, prevent the owners of houses and buildings from changing their character and use to any purpose of business which could not be accomplished without the use of a horse, or cart, or carriage.

That such is not the law, appears to us to be the result both of principle and authority; and we think that the provisions of the Highway Acts and the Metropolis Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner. We do not deny that the owner cannot derogate from the grant of roadway made by him to the public, and cannot do anything which would really and substantially interfere with the right of passage by the public. So far as we are aware, no case is to be found in the books which conflicts with the view of the law above expressed, notwithstanding the

1871

ST. MARY,
NEWINGTON
v.
JACOBS.

1871

ST. MARY,
NEWINGTON
v.
JACOBS.

numerous instances which must have occurred, in which an owner, rebuilding or changing the character of his houses or other buildings, has made crossings of the footpath, in order to carry into effect some object of convenience or business.

The case of *Lade v. Shepherd* (1) is a strong authority in favour of our view. In that case the plaintiff, being owner of land, built a street upon it which had become a high way. An owner of other land, contiguous, but separated from it by a ditch, laid a bridge over the ditch, the end whereof rested on the highway. The plaintiff brought an action of trespass against the defendant, who insisted that the plaintiff, by making it a street, and dedicating it to the public, was precluded from suing him as for a trespass on his private property, although he might be liable to indictment for a nuisance: but it was said by the Court: "It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage; but it never was understood to be a transfer of the absolute property in the soil."

That the property of the soil and freehold in a highway is in the owner, or the representative of the dedicating owner, subject to an easement for the benefit of the public, was also decided in *Dovaston v. Payne* (2), and is supported by the authorities cited in the notes to that case in 2 Smith's Leading Cases. (3) The same doctrine is clearly stated by Lord Campbell, C.J., in *Reg. v. Pratt* (4), which was the case of a conviction of the appellant under 1 & 2 Wm. 4, c. 32, s. 30, for committing a trespass, by being in the day-time on land in the occupation of one Bowyer in search of game. Pratt, the appellant, was in fact on a public highway in pursuit of game, the land on both sides being the property of Bowyer; and the Court held that he was rightly convicted, as the road was land in the occupation of Bowyer, subject only to the right of way of the public. Lord Campbell, in giving his judgment, thus expressed his opinion of the law as applicable to that case: "He," the appellant, "was beyond all controversy on land, the soil and freehold of which was in the owner of the adjoining land, that is, Mr. Bowyer. It is true the public had a right of way there; but, subject to that right, the soil and every incident to the ownership

(1) 2 Str. 1004.

(2) 2 H. Bl. 527.

(3) 2 Sm. L. C. 136, 6th ed.

(4) 4 E. & B. 860, 865; 24 L. J. (M.C.) 113.

per H.L. 684.

of the soil was in Mr. Bowyer." And the other judges, in their judgments, limit the right of the public to the use of the way for the purpose of passing and re-passing thereon. Whether or not that case is open to doubt as to the construction put upon the Game Act, it truly expresses, as we think, the true limit of the public rights over a highway; and inasmuch as the magistrate, in the present case, has expressly found, "that the freehold property in question could not be reasonably enjoyed without access across the existing footway, and that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare," we think that he was justified in dismissing the summons. Our judgment will, therefore, be for the respondent.

1871

ST. MARY,
NEWINGTON
v.
JACOBS.

Judgment for the respondent.

Attorneys for appellants: *H. F. & C. Chester.*

Attorneys for respondent: *Lewis & Sons.*

CAUDWELL, APPELLANT; HANSON, RESPONDENT.

Nov. 15.

*Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), ss. 3, 51—"Owner"—
Liability to Fees to Surveyor.*

The appellant, being seised in fee of certain building land situate within the limits of the Metropolitan Building Act, 1855, entered into an agreement with L. to grant leases of ninety-nine years of certain plots of the land, so soon as L. should have erected houses thereon, at a peppercorn until the 24th of June, 1870, and afterwards at 28*l.* a year. L. built houses which were roofed in about September, 1870, and the appellant became entitled to receive the first quarter's ground rent on the 29th of September; the houses were surveyed by the respondent, the district surveyor, and he, on the 26th of October, 1870, delivered a bill for his fees to L., who afterwards became insolvent. The respondent afterwards claimed payment of his fees from the appellant:—

Held, that the appellant was not liable to pay the respondent's fees, as he was not the "owner" of the houses within the meaning of ss. 3, 51; for that L., the lessee for ninety-nine years, whether he had a legal or only an equitable title, had the power to let the houses and receive the profits, and was therefore "owner."

CASE stated under 20 & 21 Vict. c. 43, by a metropolitan police magistrate.

Upon the hearing of a complaint preferred by the respondent, the district surveyor for the district of North Battersea, against

1871
CAUDWELL
v.
HANSON.

the appellant, under s. 51 of 18 & 19 Vict. c. 122 (the Metropolitan Buildings Act, 1855) (1), for that the appellant did unlawfully neglect and refuse to pay to the respondent the sum of *£*10s., due to the respondent by the appellant for the respondent's fees in respect of certain buildings, of which the appellant was owner within the respondent's district, a proper bill, specifying the amount of the same having been duly delivered to the appellant, the magistrate ordered the appellant to pay the sum demanded.

The following facts were either proved or admitted:—

The appellant is seised in fee of an estate within the parish of St. Mary, Battersea, called the Clapham Junction estate, which he has laid out for building purposes. The defendant is the district surveyor for the district of North Battersea, within which district the Clapham Junction estate is situate.

By an agreement dated the 18th of February, 1870, made between the appellant of the one part, and one James Lond of the other part, the appellant, in consideration of the rents, covenants, and agreements thereafter agreed to be paid and performed, agreed with Lond that when and so soon as he, Lond, should have erected and covered in with slates or tiles one messuage tenement and outbuildings upon each of the several plots of ground thereafter described to the satisfaction of the appellant's surveyor

(1) 18 & 19 Vict. c. 122, s. 51:—
“At the expiration of the following periods, that is to say, of one month after the roof of any building surveyed by any district surveyor under this Act has been covered in, of fourteen days after the completion of any such work as is by this Act placed under the supervision of the district surveyor, of fourteen days after any special service in respect of any building has been performed, the district surveyor shall be entitled to receive the amount of fees due to him from the builder employed in erecting such building, or in doing such work, or in doing any matter in respect of which any special service has been performed by the surveyor, or from the owner or occupier of the building so erected, or in respect of

which such work has been done or service performed; and if any such builder, owner, or occupier, refuses to pay the same, such fees may be recovered in a summary manner before a justice of the peace, upon its being shewn to the satisfaction of such justice that a proper bill specifying the amount of such fees was delivered to such builder, owner, or occupier, or sent to him in a registered letter addressed to his last known residence.”

By s. 3, “owner” shall apply to every person in possession or receipt either of the whole or any part of the rents and profits of any land or tenement, or in the occupation of such land or tenement, other than as a tenant from year to year, or for any less term, or as a tenant at will.

for the time being, he, the appellant, would demise, by separate leases as thereafter mentioned, unto Lond, or his nominee or nominees, four several plots of ground, being portions of the said Clapham Junction estate; and also the four several messuages or tenements and outbuildings to be erected and built thereon by Lond, for the term of ninety-nine years, from the 29th of September, 1865, at the rent of a peppercorn, until the 24th of June, 1870, and from thence at the yearly rent of 28*l.* during the remainder of the term, clear of all taxes except property tax. Lond thereby also agreed that he would at his own costs, under the inspection and to the satisfaction of the appellant's surveyor, erect and build upon each of the said several plots of land a good and substantial messuage or tenement, with out-offices, to be severally erected and roofed in by the 25th of March, 1870, and completely finished fit for habitation by the 24th of June, 1870.

Shortly after the date of the agreement Lond commenced the erection of the four houses, and proceeded therewith; but the same were not completed within the time provided by the agreement, and the appellant extended the time for such completion from time to time.

The appellant became entitled to receive the first quarter's ground rent on the 29th of September, 1870; but he has not received the same nor any subsequent rent.

The houses were roofed in, in or about the month of September, 1870. The same were duly surveyed by the respondent, who delivered to Lond, on or about the 26th of October, 1870, being one clear month after the roofs of the said four buildings respectively had been covered in, a proper bill specifying the amount of his fees, amounting to 8*l.* 10*s.*, for surveying the same pursuant to the statute; but Lond did not pay the same, and subsequently effected an arrangement with his creditors under the provisions of the Bankruptcy Act, 1869.

On or about the 6th of March, 1871, the respondent duly delivered to the appellant, as the alleged owner of the four houses, a proper bill, specifying the amount of his fees for surveying the same, which fees the appellant refused to pay.

On the part of the appellant it was contended that Lond was the owner of the buildings so erected by him, and in respect of

1871

 CAUDWELL
v.
HANSON.

1871
CAUDWELL
v.
HANSON.

which the respondent's fees were incurred within the meaning of the statute, and that the appellant was not the owner.

On the part of the respondent it was contended that the appellant was in the receipt of the rent and profits of the buildings at the time when the respondent's services were performed, and that he was the owner thereof within the true meaning of the statute; so as to be liable to the payment of the respondent's fees in respect thereof.

The question for the opinion of the Court is, whether the appellant was the owner of the buildings, in respect of which the respondent's fees were incurred, within the meaning of ss. 3 and 51 of the Metropolitan Building Act, 1855.

Waddy, for the appellant. The question is, whether the appellant is the owner of the houses mentioned in the case within the interpretation clause, s. 3 of 18 & 19 Vict. c. 122, so as to be liable for the payment of the surveyor's fees, the builder having become insolvent. By the agreement between the appellant and Lond, until the 29th of September, 1870, the appellant was to receive only a peppercorn rent, and after that day he was to receive 28*l.* a year; the houses were roofed in on or about the month of September; at that time no rent had accrued due to the appellant, and therefore, not being in receipt of the rents and profits at the time the work was done, he is not the owner, nor liable for the fees: *Evelyn v. Whicheord*. (1) In *Tubb v. Good* (2), it was unnecessary to decide whether the liability of the owner accrues at the time when the work was done, or at the time when the surveyor is entitled to send in his bill. There cannot be two owners—the lessee and the tenant in fee: *Mourilyan v. Labalmondiere*. (3) It is true in that case a lease had been executed for twenty-one years, and therefore the lessee had a legal term. But that makes no difference in principle; Lond had an equitable right, which he could, upon application to the Court of Chancery, have converted into a legal term.

W. B. Cooper, for the respondent. It is conceded that if a lease for twenty-one years had been granted, as in the case of *Mourilyan v. Labalmondiere* (3), the appellant would not have been the

(1) 1 E. B. & E. 126; 27 L. J. (M.C.) 211.

(2) Law Rep. 5 Q. B. 443.

(3) 1 E. & E. 533; 30 L. J. (M.C.) 95.

7 June 1871

owner; but as no lease has been granted, the legal estate is in him: he is therefore at law the owner, and entitled to the rents and profits. The equitable right of the intended lessee may or may not be converted into a lease at law, and he may never be possessed of a legal interest.

Waddy, in reply.

LUSH, J. I am of opinion that the appellant is entitled to our judgment, because he was not the owner of the building within the meaning of that term, as it is employed in this statute.

The question turns on s. 51. That section specifies three persons from one of whom the surveyor has the right to recover his fees. The builder, although he is only employed to erect the structure, is primarily liable. If the surveyor does not recover his fees from the builder, then he is entitled to get them from the occupier of the building; and if he does not get them from the occupier of the building, then he is entitled to get them from the owner of the building. In what sense is the word "owner" used? It is used in the popular sense, and means the person who employed the builder to build the house for him. The statute never intended that an investigation should be made into title, or to make it material whether the person who had the house erected for his own benefit had a legal title, an equitable title, or any title at all to the land. The interpretation clause does not support the respondent's case. That clause was intended to exclude the argument that the person who has all the benefit of the building is not owner because he has not a legal title; and therefore it enacts, "Owner shall apply to every person in possession or receipt either of the whole or any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement." The section cannot be taken to be confined only to buildings which are actually let, but it applies to the case of buildings which are capable of being let; and the person is called "owner" who has the immediate right of letting them, and who would, if there was an occupier, be entitled to have the rent from him; and therefore the statute excludes the question, whether the person to whom rent is payable by the occupier has or has not a legal title. I think the tenant in fee is in no sense liable. The person liable was the

1871

CAUDWELL
v.
HANSON.

1871 intended lessee alone, who entered into the agreement to take
CAUDWELL the land for ninety-nine years, and was entitled to a lease for
v. ninety-nine years, to be granted by the appellant; for, although
HANSON. he had not built the houses within the time specified in the agree-
ment, the time was extended, and therefore he would have been
entitled to go into equity and compel the appellant to grant him
a lease. He was, at the time of the building, the person who was
the owner, and the person entitled to all the immediate benefit.
On these grounds I am of opinion that the intended lessee is the
person, and the only person, who can be resorted to by the surveyor
under the words "builder, owner, or occupier."

HANNEN, J. The case is not free from difficulty, but, upon the
whole, I adopt the interpretation of the statute, which my Brother
Lush puts upon it.

Judgment for the appellant.

Attorneys for appellant: *Ingle, Cooper, & Holmes.*

Attorney for respondent: *F. Jacobs.*

WEBLEY, APPELLANT; WOOLLEY, RESPONDENT.

1871

Gunpowder—Ammunition, Keeping of, without Licence—Gunpowder Act, 1860
(23 & 24 Vict. c. 139), ss. 6, 7.

Nov. 8.

Sections 6 and 7 of 23 & 24 Vict. c. 139, which prohibit under forfeiture and penalties the manufacture and keeping, inter alia, of ammunition containing five pounds of gunpowder without a licence, apply only to the keeping by manufacturers of the articles; and a gunmaker who sells loaded cartridges manufactured by other persons is not within the enactment.

CASE stated by Justices of Birmingham, under 20 & 21 Vict. c. 43.

On an information, preferred by the respondent, inspector of nuisances for the borough of Birmingham, against the appellant, for that he did unlawfully keep certain ammunition (to wit) 50,400 cartridges containing five pounds weight and upwards of gunpowder (to wit) eighty pounds weight of gunpowder, in a certain place without such licence for that purpose as is required by the statute in that behalf, the justices convicted the appellant of the said offence.

The appellant was a gun and pistol manufacturer, and a dealer in cartridges purchased from the makers and retailed by him to customers, but not otherwise a manufacturer of any of the articles mentioned in s. 6 of the Gunpowder Act, 1860 (23 & 24 Vict. c. 139), nor a dealer in gunpowder, nor manufacturer of cartridges or other articles mentioned in s. 18, save in so far as the cartridges dealt in by him as aforesaid severally contain small quantities of gunpowder.

On the 13th of February the respondent visited the appellant's premises and found therein 50,400 loaded metal cartridges, made by Eley Brothers, of London, of various sizes, and severally containing small quantities of gunpowder, varying according to the size, from six grains each to nineteen grains each, and in the whole containing upwards of 50 lbs. (to wit), 80 lbs. of gunpowder. The appellant had not obtained and was not then in the possession of any licence for making or keeping ammunition or gunpowder, as provided by the Act.

It was contended on the part of the appellant that under the

1871

WEBLEY
v.
WOOLLEY.

above circumstances a licence under the Act was not required by him for the keeping of ammunition as aforesaid.

If the Court should be of opinion that such licence was required for keeping such ammunition, then the conviction was to be confirmed. But if the Court should be of a contrary opinion, then the conviction was to be quashed.

Field, Q.C. (E. C. Leigh with him), for the appellant. Section 6 of 23 & 24 Vict. c. 139 (1), only applies to the manufacture and keeping by manufacturers of certain articles. There is good reason why a manufacturer should not be allowed to keep more than a small quantity of powder, from the extreme danger of explosion arising from the manufacture. The case, therefore, does not fall within that section. If section 18 applies to gunpowder made into cartridges, then it would apply to a person in the position of the appellant, but he cannot be convicted under that section as he is a dealer in (though not a manufacturer of) cartridges, and therefore entitled to keep 200 lbs. of powder.

(1) 23 & 24 Vict. c. 139, s. 6: "The following regulations shall be observed with regard to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature (that is to say): No such manufacture shall be carried on without such licence for that purpose as hereinafter mentioned, or within the respective distances [mentioning them] from any dwelling-house or any building in which persons not connected with the manufacture are employed. No such articles as aforesaid, except percussion caps, exceeding the respective quantities hereinafter mentioned and set opposite the descriptions of the respective articles (that is to say)—Ammunition containing 5 lbs. of gunpowder, Fireworks containing 10 lbs. of explosive compound, Fulminating mercury or other explosive preparation, or composition of equally explosive power, 1 oz. dry, or 8 ozs. mixed with 25 per cent.

of water—shall be kept in any place not licensed for that purpose as herein-after mentioned, and no such articles shall be kept in any place so licensed in excess of the respective quantities specified in the licence in that behalf." [Then follow regulations as to the different operations in filling caps, charging cartridges, &c.]

Section 7 enacts, that all loaded percussion caps made, and all ammunition, &c., made or kept in contravention of the enactments of the statute shall be forfeited; and the person so making or keeping the ammunition, &c., or causing it to be so made or kept, is to be liable to a penalty not exceeding 10%.

Section 11 enables the quarter sessions to grant licences to places for the making of loaded percussion caps, and "for the making and keeping respectively of ammunition, fireworks, fulminating mercury, &c., and to determine the quantities of such articles to be kept in places so licensed." . . .

[HANNEN, J. The conviction is under s. 6, for keeping more than 5 lbs. of powder in cartridges, without a licence.]

1871

 WEBLEY
 v.
 WOOLLEY.

J. O. Griffiths, for the respondent. Section 2 applies, no doubt, only to the manufacturing and keeping of powder by the manufacturer; s. 18 applies to the keeping of gunpowder by dealers or others. But ss. 6 and 7 are the only sections which apply generally to ammunition; and they must apply to the keeping of ammunition, whether by the manufacturer or others. Otherwise it will be open to a person not a manufacturer to keep any amount of powder manufactured into ammunition.

COCKBURN, C.J. It is quite unnecessary to consider whether the case comes within s. 18. The conviction was under s. 6, and we are of opinion that the case does not fall within that section, and the conviction is therefore wrong. I think the distinction made on behalf of the appellant is sound, that s. 6 relates only to the manufacturing and the keeping of ammunition by manufacturers. The appellant is not a manufacturer of the articles in question, viz., cartridges, and therefore the conviction is wrong.

MELLOR and HANNEN, JJ., concurred.

Judgment for the appellant.

Attorneys for appellant: *Burton, Yeates, & Hart, for W. J. Allen, Birmingham.*

Attorneys for respondent: *Sharpe, Parkers, & Co., for Hayes, Birmingham.*

1871
Nov. 18.

THE QUEEN, ON THE PROSECUTION OF WELCH, RESPONDENT *v.*
THE GUARDIANS OF THE GAINSBOROUGH UNION, APPELLANTS.

Poor-rate—Parochial Assessment Act (6 & 7 Wm. 4, c. 96), s. 1—Drainage Rate under Local Act—"Necessary Expense to command Rent."

Under a local Act for the embanking and draining a district consisting of several parishes, an annual rate was imposed on the district, and lands occupied by the respondent were rated at a certain proportion yearly. The rate by the Act was expressly made a landlord's tax, and the respondent's landlord had accordingly always paid the amount. The whole rate under the Act was necessary for and was spent in each year in maintaining the drainage works. Without such drainage works, the land occupied by the respondent would have been under water at certain seasons, and the annual value would have been considerably diminished :—

Held, that in assessing the respondent to the poor-rate, a deduction was to be allowed, under 6 & 7 Wm. 4, c. 96, s. 1, in respect of the drainage rate, as an expense necessary to maintain the land in a state to command the rent.

ON appeal from the decision of special sessions in the matter of a poor-rate, the quarter sessions of the county of Nottingham confirmed the decision, subject to a case.

The respondent is the occupier of certain lands in the parish of Misterton, and the Duke of Portland is the owner of the lands.

Under a local Act (23 & 24 Vict. c. cliv.), called the Everton, &c., Drainage Act, 1860, and entitled "An Act to consolidate into one Act and to amend, extend, and enlarge the powers and provisions of the several Acts for embanking and draining certain low lands and grounds in the parishes or townships of Everton, Scaftworth, Gringley-on-the-Hill, Misterton, and Walkeringham, in the county of Nottingham, and to make further and better provision for such embankment and drainage," the lands occupied by the respondent became liable to be rated, and have been rated, under s. 58 (1) in each year since the passing of the Act, for the pur-

(1) By 23 & 24 Vict. c. cliv., s. 58, the commissioner under the Act is empowered, in April in every year, to assess and charge the owners for the time being of the lands specified in the determination made under the Act, in the proportions therein specified, such

sums as he shall find necessary, and to fix the day on which the same shall be paid. By s. 62, the tenant or occupier of the lands is authorized and required to pay such sum, not exceeding half a year's accruing rent, as shall be assessed and charged upon the owner,

poses for which the Act was passed, in the sum of 29*l.* 5*s.*, and a similar rate will be required in future years.

The Duke of Portland, as owner of the lands, has duly paid the sum when required, and the same has not been paid by the respondent at any time.

The whole rate raised under the Act is spent in each year in maintaining drainage works. No portion of it is expended in constructing new works, or in paying back money borrowed in former years, or in interest on such moneys.

Without such drainage rate the drainage works by which the land occupied by the respondent is drained could not be maintained.

Without such drainage works, the land occupied by the respondent would be under water at certain seasons of the year, and could not be maintained in its present state, and the annual value thereof would be considerably diminished.

In assessing the respondent to the poor-rate of Misterton, no deduction or allowance whatever was made from the gross estimated rental, in respect of the drainage rate of 29*l.* 5*s.*, in arriving at the net rateable value.

The respondent appealed against the rate to the special sessions on the ground that he was entitled to deduct that sum, and the sessions decided that he was so entitled.

The present appellants then appealed to the quarter sessions, upon the ground that no deduction whatever ought to be made in respect of the drainage rate. The quarter sessions thought that the expenses of maintaining such drainage works were expenses necessary to maintain the land in a state to command the rent at which the land was assessed in the rate, and gave judgment for the respondent.

The question for the opinion of the Court was, whether the drainage rate of 29*l.* 5*s.* ought to be deducted from the gross estimated rental of the lands.

Cave (*J. W. Mellor* with him) for the respondent. No doubt

1871

THE QUEEN

v.
GAINS-
BOROUGH
UNION.

and to deduct the same out of his rent.
By s. 63: In case the owner or his
tenant neglects to pay the assessment

within thirty days after notice of the
time of payment, the sum may be
levied on the owner's goods.

1871

THE QUEEN
v.
GAINS-
BOROUGH
UNION.

this drainage rate is made a landlord's tax by the local Act; but the respondent seeks to deduct it (under 6 & 7 Wm. 4, c. 96, s. 1) (1), not as a tenant's rate, but as an expense necessary to keep the land in a state to command the rent. It is expressly found in the case that the whole rate is spent in the drainage works, without which the land would be flooded at times and considerably diminished in value.

[He was then stopped by the Court.]

J. C. Lawrance and *Horace Smith*, for the appellants. The deductions to be made must be ejusdem generis with those mentioned. This is not a tenant's rate, but is a rate imposed by the legislature for the carrying out of public works. In *Reg. v. Vange* (2) there was a similar charge on land for keeping up the embankment of the neighbourhood, and the Court decided that no allowance could be made.

[BLACKBURN, J. That was a charge on land for the embankment of other lands, and not merely for the benefit of the land itself.]

Again, in *Reg. v. Hall Dare* (3), Cockburn, C.J., says, "Whether expenses, not incurred by the proprietor himself, but cast upon him by the maintenance of the district sewage to which he is by Act of Parliament compelled to contribute, are expenses within this provision, is a difficult question." And Mellor, J., also expresses some doubts.

[BLACKBURN, J. It was unnecessary to decide the point in that case, because the sewers rate in question was a tenant's rate, and so to be deducted.]

No doubt; but the expression of their doubts shews that the Court did not consider the question settled by *Rex v. Adames*. (4)

(1) By the Parochial Assessment Act, 1836 (6 & 7 Wm. 4, c. 96), s. 1, a poor-rate is to be made "upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe com-

mutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

(2) 3 Q. B. 242.

(3) 5 B. & S. 785, 794; 34 L. J. (M. C.) 17. *11 June 1871*

(4) 4 B. & Ad. 61, 68.

That was before the Parochial Assessment Act; and moreover, Lord Tenterden, C.J., dissented from the judgment of the Court.

[BLACKBURN, J. The principle of assessment was the same before the Act; that case is certainly strongly against the appellants.]

Parke, J., when delivering the judgment of the Court, says, in applying the principle, "There can be no difficulty in saying, that land which requires some occasional expenditure to preserve it from being damaged by water, and to make it as productive as it is, would let for less rent than similar land which requires none, the tenant defraying, amongst others, this occasional expenditure." That is not the case here; this is an annual rate charged on the whole of several parishes, and the proportion of which is fixed.

BLACKBURN, J. I am of opinion that the respondent is entitled to this deduction, under the Parochial Assessment Act, as "an expense necessary to maintain the land in a state to command the rent." The facts amount to this: there is a district which is naturally a wet fen, of which the respondent's farm forms part, and under an Act of Parliament this district has been embanked, and in order to keep this farm, amongst others, in a state for cultivation, and so to be lettable at the gross estimated rental, it is necessary to keep up the drainage works; and the expense necessary in order to do this is apportioned, under the Act, among the landowners of the district; and the Duke of Portland, as owner of the respondent's farm, pays, as his proportion in respect of it, 29*l.* 5*s.* annually. It is true that other lands, as well as this, are assessed to a certain proportion of the same charge; but I am at a loss to see why this is not an expense necessary to maintain the land in a state to command the rent. It is argued, for the appellants, that the expenses mentioned are repairs and insurance, and that the other expenses must be ejusdem generis with these: but I have been unable to perceive why this expense, which is necessary to keep off water, is not ejusdem generis with insurance which is necessary to secure premises against the effects of fire. Then, it is said, repairs and insurance are optional expenses, and only on each particular estate, whereas this is an aliquot part of a larger sum imposed by an Act of Parliament, and is not like the case where adjoining landowners voluntarily club together to do certain things

1871

THE QUEEN
v.
GAINS-
BOROUGH
UNION.

1871
THE QUEEN
v.
GAINES-
BOROUGH
UNION.

necessary for the joint protection of their estates; but I cannot see any distinction in principle between the two cases; and it is perfectly immaterial whether the charge be primarily on the occupier or landlord.

MELLOR, J. I am of the same opinion. The argument for the appellants goes to this extent, that unless the deduction claimed is in respect of tenant's rates or taxes, it is not to be allowed; but the deductions are not confined to tenant's rates and taxes merely: the statute goes on to say, "and deducting therefrom," that is, from the gross estimated rental, "the probable annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command the rent." Now it is clear that this 29*l.* 5*s.* is such a necessary expense; and therefore it is immaterial whether it is payable by the tenant or landlord; it is obvious that the machinery adopted in the Act is in order that the works may be maintained at all events, so as to secure the proper drainage of the district; and inasmuch as each part of the district is protected, it is but right that the rate should be imposed according to the acreage or value of each landlord's estate. It seems to me clear that this expense is, in principle, *ejusdem generis* with those named in the statute.

Order of Sessions confirmed.

Attorneys for appellants: *T. H. & A. R. Oldman.*

Attorneys for respondent: *Allen & Son.*

EASTON, APPELLANT; THE RICHMOND HIGHWAY BOARD,

RESPONDENTS.

1871

Nov. 18.

Highway—Encroachment—“Sides of Carriage or Cartway”—27 & 28 Vict.

c. 101, s. 51.

The Highway Act, 1864 (27 & 28 Vict. c. 101), s. 51, subjects to summary conviction, in the penalty of 40s., any person who “shall encroach . . . by making or causing to be made any building, or pit, or hedge, ditch, or other fence, . . . on the side or sides of any carriageway or cartway, within fifteen feet of the centre thereof, . . . notwithstanding that the whole space of fifteen feet from the centre of such carriageway or cartway has not been maintained with stones or other materials, used in forming highways”:—

Held, that “the sides of any carriage or cartway,” meant any land forming part of the highway, though not part of the metalled road; but did not extend to land which, though by the side of the road, had not been dedicated as highway to the use of the public.

CASE stated by Justices for the North Riding of the county of York, under 20 & 21 Vict. c. 43.

An information was preferred by the surveyor of the Richmond Highway District Board, the respondents, against the appellant, for that he unlawfully did encroach on the side of a certain carriage-way called the East Layton Road, within fifteen feet of the centre thereof, by making, or causing to be made, a certain building, to wit, a stone wall, thereon, contrary to the statutes.

Upon the hearing the following facts were admitted or proved:—

The carriageway mentioned in the information is a highway repairable by the township of West Layton, and the portion of the highway on which the alleged encroachment was made runs across the village green of West Layton, for the distance of 200 yards or thereabouts, into another highway, leading from the village of West Layton to the village of Caldwell.

The appellant is lord of the manor of West Layton, and the whole of the village, the green, and the property around belongs to him.

Before the alleged encroachment, the portion of the highway which crosses the village green was wholly unenclosed, and the width of the metalled road crossing the green was eight feet; the grass came up to the metalled road, and there was no difference

1871

EASTON
v.
RICHMOND
HIGHWAY
BOARD.

between the grass adjoining the metalled road and the rest of the green.

On the south side of the road, crossing the green for the greatest part thereof, the ground sloped gradually from the metalled road to the extent of from one foot to two feet, or an average of one and a half feet all the way down the village green; and on the north side there was a hollow at about three feet distance from the metalled road; but neither the slope nor the hollow were of such a character as to prevent carriages or other vehicles passing along or crossing the same, if it were necessary to do so for the purpose of avoiding any carriage or other vehicle travelling in a contrary direction, although for a few feet in two or three places rather more than ordinary care would require to be taken to avoid any danger of overturning. On the east side of the village green, before entering on the green, the road is for a short distance enclosed between hedges, and the width of the enclosed part, including the waste on the side of the road, is twelve feet from hedge to hedge. The road is very little used.

The appellant had lately enclosed the road across the village green, for nearly the whole length thereof by building a wall on each side. The wall is built at the foot of the slope on the south side of the road, and in the hollow on the north side thereof, and upon both the north and south side the wall is built upon the green, and about four feet from the metalled road. The width from wall to wall is sixteen feet.

The village green had generally been depastured by the tenants of the adjoining farms; and the public have always been accustomed to ride and walk or take carts across the green where sufficiently level, without interruption; but they have not exercised any greater or other right of passage over the grass adjoining the metalled road than they have over the rest of the green, which is about five or six acres in extent, and extends in width from eighty to one hundred yards on each side of the road. It was alleged by the respondents that if two carts loaded with straw or hay met upon the road, one or other would have to go on the grass, although there was no evidence that two loaded carts had ever been seen to meet. It was admitted that in such event one or other might have to go on to the grass.

It was contended by the appellant that there was nothing in the Highway Acts to prevent his building on his own land within fifteen feet of the centre of the highway, provided that he did not build upon the highway or boundaries thereof; and it was also contended that as the walls were built on the village green, and at the distance from the metalled road above stated, though leaving no more than a width of sixteen feet between wall and wall, and as the part of the green on which the walls were built (though open ground) had never, as the appellant contended, been dedicated to the public as a highway to any greater extent than the whole green had been dedicated, the walls were not built upon the highway or sides thereof, so as to be an encroachment within the meaning of the Acts, and therefore that the appellant ought not to be convicted.

The justices, however, being of opinion that the walls had been built upon the sides of the highway, leaving only a width of sixteen feet between wall and wall, and that the appellant had thereby encroached on the highway within the meaning of 27 & 28 Vict. c. 101, s. 51 (1), and being also of opinion that by reason of such encroachment the highway had been reduced in width to less than thirty feet between the fences on each side thereof, within the

1871

EASTON
v.
RICHMOND
HIGHWAY
BOARD.

(1) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 51: "From and after the passing of this Act, if any person shall encroach by making or causing to be made any building, or pit, or hedge, ditch, or other fence, or by placing any dung, compost, or other materials for dressing land, or any rubbish, on the side or sides of any carriageway or cartway, within fifteen feet of the centre thereof, or by removing any soil or turf from the side or sides of any carriage or cart way, except for the purpose of improving the road, and by order of the highway board, or where there is no highway board, of the surveyor, he shall be subject on conviction for every such offence to any sum not exceeding 40s., notwithstanding that the whole space of fifteen feet from the

centre of such carriageway or cartway has not been maintained with stones or other materials used in forming highways: and it shall be lawful for the justices assembled at petty sessions, upon proof to them made upon oath, to levy the expenses of taking down such building, hedge, or fence, or filling up such ditch or pit, and removing such dung, compost, materials, or rubbish, as aforesaid, or restoring the injury caused by the removal of such soil or turf, upon the person offending. Provided always, that where any carriageway or cartway is fenced on both sides, no encroachment, as aforesaid, shall be allowed whereby such carriageway or cartway shall be reduced in width to less than thirty feet between the fences on each side."

1871

EASTON
v.
RICHMOND
HIGHWAY
BOARD.

meaning of that section, convicted the appellant of the said offence in the penalty of 20s. and costs.

The question for the opinion of the Court was whether, upon the above facts, the appellant was justified in building the walls in question, only leaving a width of sixteen feet between wall and wall, or was bound to leave a space or roadway of the width of thirty feet.

If the Court should be of opinion that the appellant was not justified in building the walls as stated in the case, the conviction was to stand, but if the Court should be of opinion otherwise, the information was to be dismissed.

. *Field, Q.C. (Herschell with him)*, for the appellant. The conviction was under 27 & 28 Vict. c. 101, s. 51; but in order to ascertain the meaning of that section it will be as well to refer to the former statutes and the decisions under them. By 13 Geo. 3, c. 78, s. 64, it was made an offence to encroach by making a hedge or fence on any highway within fifteen feet of the centre, and it was held in *Lowen v. Kaye* (1) that no offence could be committed unless the fence was on the highway. Then came 5 & 6 Wm. 4, c. 50, and s. 69 contains a similar enactment against making a fence on any carriageway within fifteen feet of the centre; and on this Maule, J., in *Evans v. Oakley* (2), ruled that the fence, in order to be an encroachment within the section, must be on land that had been dedicated as highway; and that it was not sufficient that it was within fifteen feet of the centre of the roadway, if not on land dedicated as highway. Then came the much later case of *Chapman v. Robinson* (3), in which it was held, that, inasmuch as s. 63 defined highway to be such part of the land dedicated as had been repaired with stones or metalled within six months, a fence, erected on the carriageway but not on the part metalled within six months, was not within s. 69. It was in order to obviate that decision that the enactment in s. 51 of the Act of 1864 was passed; and it makes it an offence to erect a fence on the sides of the carriageway within fifteen feet of the centre, notwithstanding the whole space of fifteen feet on each side has not been metalled; but the section leaves the decision in *Evans v. Oakley* (2) untouched. It is clear

(1) 4 B. & C. 3. (2) 1 C. & K. 125. (3) 1 E. & E. 25; 28 L. J. (M.C.) 30.

5 June 1871. 434

from the whole section that it only refers to encroachments on the highway, that is, on land dedicated as highway, whether hard road or not, and does not extend to a fence, erected within fifteen feet of the centre of the highway, but on land by the side of the highway and not the sides of the highway. The use of the word "encroach" shews this; "encroachment" is defined in Jacob's Law Dictionary "an unlawful gaining upon the right or possession of another man." But if the green in the present instance, as the statement in the case shews, had not been dedicated, there has been no encroachment, inasmuch as the land is the appellant's own.

Manisty, Q.C. (*Cave* with him), for the respondents. "The sides of a highway" must mean something else than the highway itself. The intention of the statute is to secure a width of at least thirty feet of open space for a road; and wherever, at the passing of the last statute, the fences on each side admit of this width, or where there are no fences, s. 51 enacts that no encroachment is to be allowed within that space; it is therefore immaterial whether the strips on the side of this road were or were not dedicated as highway. But it is clear from the statements in this case that they were so dedicated.

[MELLOR, J. There is no such finding in the case.]

It is stated that the public have always used the strips.

[COCKBURN, C.J. It cannot be meant that the whole green was a highway, and the statement is expressly that the public have not exercised any greater or other right of passage over the grass adjoining the metalled road than they have over the rest of the green.]

There is sufficient in the case to lead to the conclusion that these strips were dedicated. It is clear that eight feet of road would not be sufficient for carts to pass, and there must have been constant use of the green on the sides of the road; and this distinguishes this case from *Evans v. Oakley* (1), where the land in question could not, from its nature, be used for passage. In *Elwood v. Bullock* (2), the Court say, "Where a highway passes through an enclosed country, it is not the formed road merely (whether of pavement, gravel, or other material), but the whole space from fence to fence is the highway; and an obstruction in any part is

(1) 1 C. & K. 125.

(2) 6 Q. B. at p. 409.

1871

EASTON

v.

RICHMOND
HIGHWAY
BOARD.

1871

EASTON
v.
RICHMOND
HIGHWAY
BOARD.

equally the subject of an indictment. The extent of a highway, where it passes over a common, is frequently still more indefinite to the right or left of what may be the ordinary passage."

[BLACKBURN, J. The justices have certainly not found the fact, and I see nothing in the case to lead to the conclusion that the public had a right to go over the grass where the appellant has built the walls.]

If the Court hold that the "sides of a carriageway" mean only such land at the side of the road as is shewn to have been dedicated to the public; and if there is any doubt as to this being shewn upon the statement of the case, the case should be sent back to the justices to find the fact one way or the other.

Field, Q.C., was not heard in reply.

COCKBURN, C.J. I am of opinion that the conviction was wrong, inasmuch as there was no encroachment on the part of the appellant within the meaning of s. 51. [The Lord Chief Justice read the section.] I agree with Mr. Field's suggestion that the change in the wording from the language of the former enactment was intended, not to interfere with the ruling of Maule, J., in *Evans v. Oakley* (1), but to meet the decision in *Chapman v. Robinson* (2), where, under the statute of Wm. 4, it had been held that a building, erected within fifteen feet of the centre of the highway, but not on any part that had been repaired and used for passage by the public within six months, was not within the enactment. And the intention of the new Act appears to have been to comprise within its enactment, not only the metalled part, but also any part on the side of the road that had been dedicated and could be used for passage, as distinguished from rough pieces which could not be so used. This seems to be the true construction of s. 51, and it was meant to meet the case of land which, although not metalled, had been dedicated, and which, in *Chapman v. Robinson* (2), had been held not to be within the enactment of the former statute. On the other hand, *Evans v. Oakley* (1) is a very reasonable decision, and amounts to this, that it was not to be supposed that land which could not be used for passage had been comprehended in the dedication to the public by the land-

(1) 1 C. & K. 125.

(2) 1 E. & E. 25; 28 L. J. (M.C.) 30. *5/2*
18484

owner. And inasmuch as it would still remain in the owner, it would be a clear confiscation of property if we were to say that by dealing with such land as his own he would be guilty of an encroachment. But if by "the sides of the road" we understand merely that part of the highway which was held in *Chapman v. Robinson* (1) not to be within s. 69 of the old Highway Act, and hold that land, shewn to be part of the land dedicated as highway, though not yet made into hard road, is within s. 51 of the new Act, we do all that is necessary to protect the rights of the public, without any interference with the rights of the owner of the soil. For inasmuch as the owner by dedicating the land had abandoned all rights inconsistent with such dedication, there is no hardship in saying that he cannot erect a fence or building upon the land. In the present case, there is a road or highway passing over an open green or common, which is the property of the appellant; and, inasmuch as no part of the green, though on the sides of the road or highway, is shewn to be "the sides of the highway" (if we are right in understanding that there had been no dedication beyond the actual road), the building of the wall by the appellant on the green is not an encroachment within the intention of the legislature, as evinced by the terms which they have used in s. 51, and the magistrates were wrong in convicting.

BLACKBURN, J. I am of the same opinion, that the magistrates were wrong in the construction they put on s. 51, though it certainly was a very natural mistake. In the first place a highway may exist which is not metalled road at all; but generally a part is metalled and a part left which is not hard road; and in general when the highway is between two fences all the ground that is between the fences is presumably dedicated as highway, unless the nature of the ground or other circumstances rebut that presumption. In the present case there are no fences, and there is nothing to raise the presumption that one part of the open green more than another beyond the actual road has been dedicated. At common law, any one who made an encroachment on a highway, whether metalled or not, might be indicted, and so he may be

1871

 EASTON
 v.
 RICHMOND
 HIGHWAY
 BOARD.

(1) 1 E. & E. 25; 28 L. J. (M.C.) 30. *41434*

1871

EASTON
v.
RICHMOND
HIGHWAY
BOARD.

now. But statutes have from time to time been passed to enable magistrates summarily to punish the offender, or to enable the encroachments to be removed. We may pass over 13 Geo. 3, c. 78. By 5 & 6 Wm. 4. c. 50, s. 69, if any person shall encroach by making, or causing to be made, any building or fence on any carriageway within fifteen feet from the centre thereof, he is made liable to a penalty; and under this section Maule, J., in *Evans v. Oakley* (1), ruled that the erection must be both on the highway and within fifteen feet of the centre of it, and the jury, under that direction, found for the plaintiff, the landowner, who had erected a fence on land which had never been, and could not be, used as a highway; that was a perfectly right decision. Then, in *Chapman v. Robinson* (2), the encroachment was on an admitted highway, but on that part of it which had not been metalled or repaired within six months, and this Court held that the encroachment was not within s. 69, by reason of the definition in s. 63, which defined highway, for the purposes of the Act, to be that part of it which had been maintained and repaired with hard materials within the preceding six months; and it would seem that the Court could not well have held otherwise under those sections. In s. 51 of the present Act, the language is changed, and instead of "on a carriage or cart way," the words are, "on the side or sides of any carriage or cart way." At first it struck me that this amounted to a prohibition that, where there was already no inclosure, no one might build or raise a fence on the adjoining land at the sides of the road within fifteen feet of the centre of the road; but that would have been to take away the interest of the landowner without any compensation, and it requires a clear indication of such an intention from the words used to do that. If the clause, "notwithstanding that the whole space of fifteen feet from the centre had not been maintained with stones," &c., had been left out, I should have thought that the other part of the section amounted to the prohibition I have mentioned; but those words seem to confine the operation to the highway, that is, to land dedicated as highway, though not actually made into a road. It is said in one of Lord Coke's reports (3), that in construing a statute, one must look at

(1) 1 C. & K. at p. 127.

(3) See *Heydon's Case*, 3 Rep. on f.

(2) 1 E. & E. 25; 28 L. J. (M.C.) 30. - 7, b.

5 June 1871

what the law was at the time the statute passed, and at what was intended to be remedied; and applying that principle to the present statute, I think we must construe it as if it had recited the decision under the former Act, and then had proceeded to enact that an encroachment on the sides of a carriageway should be a prohibited encroachment, notwithstanding that the whole space of fifteen feet from the centre is not hard ground. Still the encroachment must be on the sides of the carriageway, that is, on a part of the ground dedicated as highway. As to the finding of the justices, as the case is stated, I should rather read it as amounting to a statement that there had been no dedication of any part of the common beyond the metalled road; at all events, there is certainly no finding that there had been any such dedication; and therefore the conviction was wrong, and there must be judgment for the appellant. If, however, our judgment proceeds on an erroneous view of the facts, as derived from the imperfect statement in the case, there is nothing, that I know of, to prevent an indictment against the appellant for a nuisance to the highway.

MELLOR, J. I am of the same opinion. I agree that we cannot suppose it was the intention of the legislature to take away the property of the landowner, and prevent him building or erecting fences on land which he had not dedicated to the public, unless such an intention is manifest, and I find nothing amounting to such an expression of intention in s. 51; but the contrary. [The learned Judge read the section.] Amongst other things prohibited, is the removal of turf from the sides of the carriageway without the order of the highway board or surveyor; now, "the sides of the carriageway" could not have been intended to include land, by the side of the road but not dedicated; as, in that case, no order of the highway board or surveyor could have justified the taking off of the turf, as against the owner, whose property it was, nor would any prohibition against its removal by a stranger have been necessary, as the owner could have taken proceedings. I agree that there is no evidence of dedication of these slips of land, and I think, therefore, that the justices must have proceeded on an erroneous interpretation of the meaning of "on the

1871

 EASTON
 v.
 RICHMOND
 HIGHWAY
 BOARD.

1871

EASTON
v.
RICHMOND
HIGHWAY
BOARD.

side or sides of any carriage or cartway," and were wrong in convicting the appellant.

Judgment for the appellant.

Attorneys for appellant: *Pattison, Wigg, & Co.*

Attorney for respondents: *J. L. Tomlin, for J. R. Tomlin, Richmond, Yorkshire.*

Nov. 18.

JOYCE AND OTHERS v. KENNARD.

Marine Insurance—Construction of Policy—Insurance of Liability as Carriers—Mode of estimating Underwriters' Liability.

The plaintiffs, J. & Son, were lightermen, and effected an insurance in the form of an ordinary Lloyd's policy, at and from all wharves on the Thames, from Wandsworth to the Victoria Docks, which contained the following clause:—"To cover and include all losses, damages, and accidents amounting to 20*l.* or upwards in each craft, to goods carried by J. & Son as lightermen, or delivered to them to be waterborne, either in their own or other craft, and for which losses, damages, and accidents J. & Son may be liable or responsible to the owners thereof, or others interested." The policy was subscribed by different underwriters for different sums amounting to 2000*l.*, and the defendants underwrote the policy for 100*l.* A loss happened to goods carried by the plaintiffs in a barge, for which the plaintiffs became liable to those interested in the goods to the amount of 1100*l.* The total value of the risks of the plaintiffs in this and other barges at the time of the loss and covered by the policy amounted to 20,000*l.* :—

Held, that, on the construction of the policy, the plaintiffs were entitled to be indemnified for the loss actually sustained, viz., 1100*l.*, and to recover from the defendant 55*l.*, his proportion; and that the sum to be recovered was not merely such a proportion of the plaintiffs' loss as the sum for which the defendant subscribed the policy, viz., 100*l.*, bore to the value of all the goods afloat and covered by the policy at the time of the loss, viz., 20,000*l.*

CASE stated without pleadings.

The plaintiffs are lightermen, and the defendant is an underwriter. In the month of October, 1869, the plaintiffs caused a policy of insurance to be effected on their behalf.

The policy in point of form was the ordinary Lloyd's policy, adapted to the particular risk. The words of the policy were "lost or not lost at and from all or any of the wharves, banks, quays, and places of arrival or departure in the river Thames, and any merchant or steam vessel of any description therein comprising the whole extent of the said river from Wandsworth downwards to

the Victoria Docks, including all or any intermediate docks and wharves, and vice versâ, until on board any merchant or steam-vessel, barge, or boat, or otherwise, landed at any wharf, &c. The risk to commence on the 25th of September, 1869, and to terminate on the 24th of September, 1870, including both days, upon any kind of goods and merchandise . . . in craft of any description . . . the adventure beginning upon the said goods and merchandise from the loading thereof aboard the ship as above, . . . and so continue and endure during her abode there upon the said ship, &c., and, further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandise whatsoever, shall be arrived at as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandise until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports and places whatsoever and wheresoever in the river Thames, from Wandsworth to the Victoria Docks and vice versâ. The ship, &c., goods and merchandise, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at on all goods and produce as interest may appear." The sum stated in the margin was 2000*l*. The premium was 70*s*. per cent. and at the bottom of the policy, in writing, was the following clause:—"To cover and include all losses, damages, and accidents amounting to 20*l*. and upwards, in each craft to goods carried by Messrs. Joyce, as lightermen, or delivered to them to be waterborne, either in their own or other craft, and from which losses, damages, and accidents, Messrs. Joyce may be liable or responsible to the owners thereof, or others interested. It is agreed that the amount of each underwriter's liability shall not exceed the amount of his subscription."

This policy was subscribed by different underwriters for different sums, amounting in the whole to 2000*l*.

The defendant underwrote the policy for 100*l*., and received by way of premium the sum of 3*l*. 10*s*.

On the 7th of December, 1869, and during the continuance of the risk covered by the policy, a loss, damage, and accident, within the meaning of the policy, happened to goods carried by the plain-

1871

JOYCE
v.
KENNARD.

1871

 JOYCE
 v.
 KENNARD.

tiffs as lightermen, in a craft called the *Lord Cardigan*, and for which loss the plaintiffs have become liable and responsible to the owners and others interested in the goods, to the sum of 1100*l.*, and have paid that amount.

It is agreed that the total value of the risks of the plaintiffs in this and other barges employed by the plaintiffs at the time of the loss, and which were covered by the policy, amounted to the sum of £20,000 and upwards. The total value of the goods in the barge *Lord Cardigan* at the time of the loss was 2906*l.*

The plaintiffs contend that upon the true construction of the policy they are entitled to be indemnified for the loss actually sustained, viz., 1100*l.*, and to recover from the defendant 55*l.* as his proportion of such loss.

The defendant contends that under the policy the plaintiffs are only entitled to recover from the defendant such a proportion of their loss as the sum for which the defendant subscribed the policy, viz., 100*l.*, bears to the total value of all the goods on board all the plaintiffs' craft which were between the limits mentioned in and which were covered by the policy at the time of the loss; and they have paid into court the sum of 6*l.*, which is admitted to be sufficient to satisfy the plaintiffs' claim, assuming this contention to be correct.

The defendant further contends, that, in any view, the plaintiffs are not entitled to more than such proportion of the loss, as 100*l.*, the sum insured, bears to the total value in the barge, viz., 2906*l.*

The Court was to be at liberty to draw all inferences of fact which a jury ought to have drawn.

The question for the opinion of the Court was, which of the principles above referred to is the proper principle upon which the amount to be recovered by the plaintiffs ought to be settled.

Quain, Q.C. (*A. L. Smith* with him), for the plaintiffs. The question is, what is the nature of the risk intended to be covered by the policy? This is not an ordinary marine risk, but the policy is intended to cover all losses and damages for which the plaintiffs may be liable to the owners of the goods delivered to them to be carried, and which are being carried by the plaintiffs within the limits of the policy. The subject-matter of the policy is the

liability of the plaintiffs, as carriers, to the owners of goods entrusted to them: for the words which govern the whole clause are "for which losses, damages, and accidents, Messrs. Joyce may be liable or responsible to the owners thereof, or others interested." It is clear, therefore, that the parties intended that the policy should indemnify the plaintiffs to the extent of 2000*l.* for any loss which they might sustain as carriers in their trade, and for which they would be liable over to the owners of the goods. *Crowley v. Cohen* (1) will be relied upon on the other side, and it will be said on the authority of that case that the defendant is only liable to such a proportion of the loss as 100*l.*, the sum for which the defendant has subscribed the policy bears to 20,000*l.*, the total value of goods then being carried by the plaintiffs; but that case has no application; the policy there covered an ordinary canal navigation risk, and was construed to be a policy attaching upon the goods upon all the boats at a given time. Here, by express words, the insurance is upon all losses for which the plaintiffs are liable: the plaintiffs are therefore entitled on this policy to recover 1100*l.*, and the policy remains in force to cover 900*l.* more if there should happen to be a further loss. In *Wilson v. Jones* (2), the risk was upon the adventure—the laying down safely of an electric cable; here it is upon the liability of the carriers to make good the loss of goods to the owners.

Sir G. Honyman, Q.C. (*Watkin Williams* with him), for the defendant. The question is, what construction is to be put on the words of this policy? There is a distinction between a contract of marine insurance and fire insurance. In a fire insurance if goods valued at 20,000*l.* be insured for 1000*l.*, and a loss to the extent of 1000*l.* occurs, the insurer is liable for that amount; but with regard to a marine insurance, if goods to the value of 20,000*l.* are insured for 1000*l.*, and a loss occurs, it is necessary to ascertain what proportion the goods lost bear to the whole value, for the owner of the goods is his own insurer for 19,000*l.* In this case, therefore, the true measure of liability is the proportion which 100*l.* bears to the value of all the goods afloat at the time of the loss, and that is stated in the case to be 20,000*l.* Then it is said, that principle does not apply because the words of the policy are

1871

JOYCE
v.
KENNARD.

(1) 3 B. & Ad. 478.

(2) Law Rep. 2 Ex. 139.

1871

 JOYCE
 v.
 KENNARD.

"to cover all losses for which they may be responsible to the owners;" these words do not alter the extent of the liability of the underwriters, they are intended to describe the subject-matter of the insurance, and do not contravene the well-known principle that an underwriter undertakes to underwrite to the amount of the loss only in such a proportion as his subscription bears either to the value of the policy, if a valued policy, or to the total value of the risk, if an open policy. The insertion of 2000*l.* in the margin of the policy does not make it a valued policy; it is done merely for the purpose of fixing the stamp. There is nothing to distinguish this case from *Crowley v. Cohen*. (1) In both cases the policy was effected by a lighterman to cover the risk which he ran, and the Court say that the ordinary principle of calculating the loss upon a marine insurance is to be applied in calculating the loss on the policy in that case. Applying the principle laid down in *Wilson v. Jones* (2), the clause in question is inserted not for the purpose of settling the extent of the underwriter's liability, but to shew what is the subject-matter of the insurance, and that it is the goods in which the plaintiffs are interested as carriers.

Quain, Q.C., was heard in reply.

MELLOR, J. I am of opinion that our judgment should be for the plaintiffs. This is not strictly a marine insurance; it is a contract by which the defendant indemnifies the plaintiffs against any liability which they may incur as carriers to the owners of the goods entrusted to them, and we must construe the words which have been used according to their ordinary meaning, and their meaning is that for which the plaintiffs contend.

LUSH, J. I am of the same opinion. This is an exceptional policy, and we have only to construe the language used; and when I look at the position of the plaintiffs and find that they are carriers upon the river, I cannot doubt the intention of the parties. The object of the plaintiffs was to secure an indemnity against any loss in whole or in part which they might sustain as carriers, and it is not a mere policy on goods. A case may be supposed in which the goods have perished and yet the underwriters might not be liable

(1) 3 B. & Ad. 478.

(2) Law Rep. 2 Ex. 139.

on this policy. The subject-matter insured against is the liability which the plaintiffs would sustain in respect of the goods by reason of their accepting them as carriers. I cannot interpret the words of the policy in any other sense than as importing that the underwriters undertook to be responsible to the extent of their subscriptions for all the losses, which the plaintiffs might sustain in respect of those goods, and for which they would be liable to the owners. The language has that meaning, and I do not entertain a doubt that that is what the parties intended. It is not an ordinary marine policy, but a policy of a mixed nature, the object of which was to secure to the plaintiffs an indemnity to the extent of the sum subscribed for, for any loss during the year which they might sustain by reason of their being responsible as carriers for the loss of the goods.

1871
JOYCE
v.
KENNARD.

HANNEN, J., concurred.

Attorneys for plaintiffs: *Plews & Irvine.*

Attorneys for defendant: *Parker & Clarke.*

THE QUEEN ON THE PROSECUTION OF THE ASSESSMENT COMMITTEE
OF ST. PANCRAS, RESPONDENTS *v.* THE GOVERNORS OF THE
FOUNDLING HOSPITAL, APPELLANTS.

Nov. 8.

*Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), ss. 45, 54—Valuation
List—Exceptional Principles of Valuation.*

Part 90

In making out the valuation list under the Valuation (Metropolis) Act, 1869, the gross value and rateable value, as defined by s. 4, of each hereditament, must be inserted, without reference to any privilege of being assessed on an exceptional principle of valuation.

On an appeal by the governors of the Foundling Hospital against a decision of the assessment committee of the parish of St. Pancras, confirming an assessment in the new valuation list for the said parish, made under the Valuation (Metropolis) Act, 1869, whereby the building and premises used by the appellants for the purposes of the hospital were assessed at 1900*l.* gross, and 1592*l.* rateable value, the Court of General Assessment Sessions for the metropolis confirmed the assessment, subject to a case. (1)

(1) See 32 & 33 Vict. c. 67, ss. 23–41.

1871

THE QUEEN
v.
FOUNDLING
HOSPITAL.

1. The Foundling Hospital was incorporated by royal charter in 1739; by an Act passed in the same year, 13 Geo. 2, c. xxix., the powers granted by the charter were confirmed, and the corporation were empowered to hold lands, &c. ; and it was enacted—

That all and every house or houses, lands, tenements, or hereditaments, which shall at any time hereafter be purchased or hired by the said corporation to be used or converted into an hospital or hospitals aforesaid, or on which any such hospital or hospitals, house or houses, shall be erected, shall at all times hereafter whilst such house or houses, lands, tenements, or hereditaments shall continue in the possession of the said corporation, be rated and assessed to all rates and assessments at such yearly rates and value and in such proportion as such house or houses, lands, tenements, or hereditaments were rated and assessed in the year 1739; and shall not at any time hereafter, so long as they shall continue in the possession of the said corporation aforesaid, be rated or assessed at any higher value, notwithstanding any improvement which shall be hereafter made by the said corporation, of or upon the same by erecting any such house or houses, or other building or buildings, or by converting any building or buildings into such hospital or hospitals, house or houses, any laws, statute, or usage to the contrary notwithstanding.

2. In 1741 the corporation purchased the freehold estate on part of which the hospital now stands. It consists of about fifty-six acres lying in one block, and was at that time open ground, but, with the exception of the inclosed space surrounding and attached to the hospital building, it is now covered with houses. It is situate in the three parishes of St. Pancras, St. George the Martyr, and St. George, Bloomsbury. The hospital building itself was commenced about 1742 and finished about 1752.

3. The lands so purchased and still held by the hospital were assessed in 1739 to the poor-rate of St. Pancras at the yearly value of 275*l.* gross and 234*l.* net, and the governors of the hospital, since they acquired the aforesaid lands down to the present time, have been uniformly rated in respect of the land and of buildings thereon used for the hospital at the yearly rateable value of 234*l.* to all rates and assessments whatsoever, except such as were made under 34 Geo. 3, c. xcvi. as hereinafter mentioned.

4. & 5. Up to 1790 no building leases were granted by the hospital on their estate, but in that year a committee was appointed empowered to grant leases; and in consequence of the large building operations then commenced, the hospital obtained in 1794 an Act (34 Geo. 3, c. xcvi.) by which the governors were

to elect twenty-one of their body, and the inhabitants, householders of the district, were to elect twenty-one persons to act as commissioners, and the streets and paving, lighting, &c., were vested in the commissioners; and certain rates not exceeding the sums mentioned in the pound were to be made and levied by the commissioners for the above purposes.

7. The annual value of the tenements to be rated was to be ascertained according to the real rack rent or full yearly value thereof or in any fair and equal proportion of such real rack rent or full yearly value as the commissioners should think proper.

8. The hospital, with the offices, buildings, and ground belonging or to belong thereto, and used for the purposes of the hospital, was to be assessed for all the purposes of the Act, according to such annual sum or value as should be equal to three-fifth parts of the amount of the several annual values which should be assessed upon the several houses abutting upon Milman Street to the mews opposite to Lansdowne Place, and the several houses adjoining upon or immediately adjoining the boundary walls or fences of the hospital. The ground enclosed by the walls of the hospital and retained for its use is about nine acres in extent, and is wholly within St. Pancras parish.

9 & 10. From the time of the passing of 34 Geo. 3, c. xcvi. (1794) down to the passing of the Police Metropolitan Act, 10 Geo. 4, c. 44 (1829) the governors of the hospital were rated by the commissioners appointed under 34 Geo. 3, c. xcvi., for all the purposes of the said Act, including that of watching the streets and squares, &c., within the limits of the Act on a value ascertained in the manner provided by that Act. In 1829, 10 Geo. 4, c. 44, was passed; by s. 19 the night watch within their district was discontinued, and the power of assessing and levying any rate for that purposed ceased; and by s. 23 a rate for the metropolitan police became leviable according to the valuations for the time being acted upon in assessing the county rate; accordingly from the passing of that Act down to the present time the governors of the hospital ceased to be rated under 34 Geo. 3, c. xcvi., for watching the streets and squares aforesaid, and have been rated for the Metropolitan police upon the basis of the county rate under the Act of 1829 at 234*l.* rateable value.

For many years before and at the time of the passing of the

1871

THE QUEEN
v.
FOUNDLING
HOSPITAL.

1871 Metropolis Local Management Act (18 & 19 Vict. c. 120) (in
 THE QUEEN 1855) the governors of the hospital continued to be rated under
 v. 34 Geo. 3, c. xcvi., for all the purposes of that Act, except that of
 FOUNDLING watching, upon the value ascertained as above stated of 1244*l.*,
 HOSPITAL. being the actual amount upon which the rate was made.

12 & 13. The Metropolis Local Management Act (18 & 19 Vict. c. 120) came into operation on the 1st of January, 1856, and the government of the metropolis for the purposes of the Act is placed under the control of the Metropolitan Board of Works and of certain local district boards, of which the vestry of St. Pancras parish is one.

14. The principal sections relative to rating and assessment are as follows:—[The case then set out ss. 161 & 162.]

15. The following sections relate to the repeal and varying of inconsistent or conflicting local Acts. [The case then set out ss. 247 & 248.]

16. From the passing of the Metropolis Local Management Act down to the present time, the governors of the hospital have ceased to be rated for the purposes of paving, lighting, cleansing, or any other purpose whatsoever within the limits of the 34 Geo. 3, c. xcvi., and have been rated for the purposes of the Metropolis Local Management Act, within the parish of St. Pancras, as well as to all other rates, up to April, 1867, at 234*l.* gross, and 234*l.* rateable value, and since that time at 275*l.* gross, and 234*l.* rateable value.

17. Up to the passing of the Metropolis Local Management Act the governors of the hospital paid sewers rates to the Commissioners of Sewers upon 234*l.* rateable value; since the passing of that Act they have paid sewers rates to the parish of St. Pancras upon the same value.

18. On the 9th of August, 1869, The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67) was passed, which (by s. 1) incorporates in it 25 & 26 Vict. c. 103, so far as it is consistent with the tenor thereof, and (by s. 7) ss. 17 to 26 inclusive.

19. Section 45 of 32 & 33 Vict. c. 67, is as follows:—

The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evi-

dence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted, that is to say :—

(1.) For the purpose of any of the following rates which are made during the year that the list is in force, namely, the county rate, the metropolitan police rate, the church rate, the highway rate, the poor-rate, the police, sewers, consolidated, and other rates in the city of London, the sewers, lighting, general, and other rates levied by order of district boards or vestries, the main-drainage improvement and other rates and sums assessed on any part of the metropolis by the Metropolitan Board of Works, assessments for contributions under the Metropolitan Poor Act, 1867, and every other rate, assessment, and contribution levied, made, and required in the metropolis on the basis of value.

(2.) For the purpose of any of the following taxes which become chargeable during the year that the list is in force, namely :—

(a.) The tax on houses levied under the House Tax Act, and the Acts therein incorporated or referred to.

(b.) Any tax assessed in pursuance of the Income Tax Act, and Acts continuing or amending the same, on any lands, tenements, and hereditaments in all cases where the tax is charged on the gross value and not on profits.

(3.) For the purpose of determining, so far as it is applicable, the value of any hereditament included therein for the purposes of the Acts relating to the sale of exciseable liquors, to the qualification of a juror, to the qualification of a vestryman, and an auditor of accounts under the Metropolis Management Act, 1855, and to the qualification of a guardian, and of a manager under the Poor Law Amendment Act, 1834, or the Metropolitan Poor Act, 1867, at any time at which such value is required to be ascertained.

And in construing the Metropolitan Police Act and the Acts amending the same, the last valuation for the time being acted upon in assessing the county rate, shall be deemed to mean the valuation list for the time being in force.

And in construing the County Rate Act, and Acts referring to the valuation, estimate, basis, or standard for the county rate, the valuation, estimate, basis, or standard shall be deemed to be the rateable value stated in such list.

And in construing the House Tax Act, and the Acts therein incorporated or referred to, the full and just yearly rate shall be deemed to be the gross value stated in such list.

And in construing the Income Tax Act, and any Acts continuing or amending that Act, with respect to schedules A. and B. thereof, annual value shall be deemed to mean the gross value stated in such list.

20. Section 54 :—

Nothing contained in this Act, or the Acts incorporated herewith, shall affect any exemption or deduction from or allowance out of any rate or tax whatever, or any privilege of or provision for being rated or taxed on any exceptional principle of valuation.

21. On the hearing of the appeal the appellants contended that the sums of 275*l.* gross and 234*l.* net should alone be inserted in the valuation list, such sums being the sums ascertained in the

1871

THE QUEEN
v.
FOUNDLING
HOSPITAL.

1871 manner pointed out by the Foundling Hospital Act, 13 Geo. 2,
THE QUEEN c. xxix.

22. The appellants further contended that in any case the entry, as it at present stands, is improper and insufficient, and that, if the actual gross and rateable value is entered at all, it ought to be accompanied with such special note or instructions as would prevent the parish officers from making the rates referred to in s. 45 of The Valuation (Metropolis) Act, 1869, upon such actual value, and would direct them to make the rates on the value ascertained as provided by 13 Geo. 2, c. xxix.

23. The respondents contended that the true gross and rateable value of the property, as defined by The Valuation (Metropolis) Act, 1869 (1), should be inserted in the valuation list, leaving the parish officers when making the poor-rate to make it on this exceptional principle of valuation referred to in the statute of 13 Geo. 2, c. xxix., and when making the general rate under s. 161 of 18 & 19 Vict. c. 120, for maintaining, paving, and repairing, &c., the roads, &c., and for the payment of the interest on the board debts of the extinct paving trust, to make such general rate on the exceptional principle of valuation referred to in the statute of 34 Geo. 3, c. xcvi.

24. The respondents further contended that at any rate the sum of 275*l.* gross and 234*l.* net ought not alone to appear in the list, but that some special entry ought to be made in the valuation list with reference to the appellants' property so as to enable the parish officers properly to make the rates referred to in s. 45 of The Valuation (Metropolis) Act, 1869.

25. The Court of General Assessment Sessions confirmed the valuation list as it stood.

26. The Acts referred to are to be taken to form part of the case.

41. (1) By 32 & 33 Vict. c. 67, s. 2, "gross value" means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and if the landlord

undertook the cost of the repairs and insurance, and any other expenses, if any, necessary to maintain the hereditament in a state to command that rent. "Rateable value" means the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid.

The questions for the opinion of the Court were, 1st, whether the true gross and rateable value of the appellants' property now in their occupation, as defined by The Valuation (Metropolis) Act, 1869, should be inserted in the valuation list; or, 2nd, whether the gross and rateable value of such property for the purposes of such list should be ascertained as pointed out by the Foundling Hospital Paving Act (34 Geo. 3, c. xcvi.); or, 3rd, whether the gross and rateable value of such property for the purposes of such list should be ascertained in the manner pointed out by the Foundling Hospital Act (13 Geo. 2, c. xxix.); or, 4th, whether the valuation list should contain a special entry, shewing in addition to the true gross and rateable value of such property the gross and rateable values ascertained under the said Acts of Geo. 2 and 3, or either, and which of them, and whether it should contain any and what instructions as to the making of rates on the said values respectively.

1871

 THE QUEEN
 v.
 FOUNDLING
 HOSPITAL.

Poland, for the respondents, contended that all that ought to appear in the valuation list under 32 & 33 Vict. c. 67, was the gross value, and the rateable value ascertained as required by s. 4.

Milward, *Q.C.*, and *Fullarton*, for the appellants, contended that as s. 54 saved all exemptions and exceptional modes of rating, at all events the values of 275*l.* gross and 234*l.* rateable value ought to appear in the valuation list.

THE COURT (Cockburn, C.J., Mellor and Hannen, JJ.) were of opinion that it was clear that all that need appear on the valuation list were the gross value and rateable value, as defined by s. 4; and although, by s. 45, the valuation was to be final for all purposes generally speaking, yet, in making the rates the overseers or other officers would be bound, by s. 54, to observe and give the hospital the advantage of any privilege or provision for being rated or taxed on any exceptional principle of valuation.

Judgment for the respondents. (1)

Attorney for appellants: *J. T. Simpson.*

Attorney for respondents: *W. D. Cooper.*

(1) See the next case.

1871
Nov. 18.

THE QUEEN ON THE PROSECUTION OF THE MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION, APPELLANTS *v.* THE ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION, RESPONDENTS.

Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67)—*Union Assessment Committee Acts, 1862 and 1864 (25 & 26 Vict. c. 103 and 27 and 28 Vict. c. 39)*—“*Rateable Hereditaments*”—“*Westminster Chambers.*”

The Westminster Chambers consist of seven blocks of buildings, having seven principal entrances. Each block is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance. The blocks are structurally divided into 117 different sets of rooms, which are quite distinct from each other, like chambers in the Inns of Court, and are capable of being let and occupied separately as residences or offices. Each set has an outer door opening on to one of the internal staircases, and also an inner private hall or passage. There is no means of communication between the sets except the internal staircase. The outer or street door to each block is kept locked at night, and a porter, who is hired by the lessors, resides in a distinct set of rooms in the basement of each block, and has a key of, and access to, the sets of rooms, for the purpose of a general superintendence, and as the servant of the occupiers respectively, by whom he is employed in some cases to look after the rooms. The lessors provide gas for the staircases, halls, and passages, and water for the entire buildings, and pay all rates and taxes, charging their tenants higher rents in consequence. The sets of rooms are let under an agreement, by which the lessors let for a certain time, at a certain rent, with a covenant by the lessors to pay the rates, and a covenant by the lessee to repair internally, and a power to the lessors to enter to paint outside and to inspect the state of the inside, with a proviso for re-entry on the non-payment of rent or breach of the other covenants. The premises being taken subject to the following regulations:—The care of each entrance and the rooms connected therewith will be in charge of a resident porter appointed by the lessors. There are duplicate keys to the outer door of each set of chambers, one of which is to be always in the hands of the porter, and the other in the care of the tenant while the rooms are in use. The tenants have the right, free of charge, to the general services of the porter; viz., he is to be constantly in attendance, to cleanse the general stairs, &c., every morning, to receive and deliver all letters and parcels, to receive the keys of the outer doors of the several sets of rooms from the tenants on their leaving at night, to attend to the regular and proper supply of coals to the several apartments. Coals are supplied by the lessors at a certain price, tenants are not allowed to have stores of coals in their rooms:—

Held, that each set of rooms was separately occupied by its tenant, and was therefore a rateable hereditament, and ought to be separately inserted and assessed in the valuation list under the *Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67)*.

CASE stated by the Court of General Assessment Sessions under the *Valuation (Metropolis) Act, 1869. (1)*

(1) See 32 & 33 Vict. c. 67, ss. 23–41.

1. The appellants, the Mutual Tontine Westminster Chambers Association, Limited, objected, before the respondents, the assessment committee of the St. George's Union, to the valuation of certain buildings known as "the Westminster Chambers" in the valuation list of the parish of St. Margaret and St. John, Westminster, of which the appellants were the owners; and the committee having affirmed the valuation, the appellants appealed to the General Assessment Sessions, on the ground that the Westminster Chambers were erroneously assessed in the valuation list as 117 hereditaments, and should have been assessed as seven hereditaments only.

2. The Westminster Chambers consist of seven blocks of building, having seven principal entrances. Each of these blocks is divided into two ranges by an internal staircase which has only one door at the principal or street entrance. These blocks of building are structurally divided into 117 different suites or sets of rooms which are quite distinct from each other, like chambers in the Inns of Court, and are in some instances let and occupied, and in every instance capable of being let and occupied separately as residences or offices. Each suite or set of rooms has an outer door opening on to one of the internal staircases, and also an inner private hall or passage, a watercloset, and a lavatory. There is no means of communication between these suites or sets of rooms except the internal staircases.

3. The form of agreement annexed, with the memorandum and schedule, shews the terms upon which the rooms are let.

An agreement made and entered into the _____ day of _____ 18____, between the Mutual Tontine Westminster Chambers Association (Limited), the lessors, of the one part, and the lessee of the other part. The lessors hereby let, and the lessee hereby takes, all that _____ rooms numbered _____ and being on the _____ floor of the buildings, and numbered _____ of the chambers belonging to the association called the Westminster Chambers, situate in Victoria Street, in the city of Westminster, together with the use of the water-closet and washing-closet attached thereto, and also the use in common with other tenants of the entrance hall, and stairs, and lift leading to the same premises for the term of _____ year[s] from the _____ day of _____, 18____, and so on from quarter to quarter, but determinable at the end of the first quarter, or of any subsequent quarter, by either of the parties giving to the other of them three calendar months previous notice, in writing, for that purpose, at the quarterly rent of _____ payable on the usual quarter days, free from all deductions whatsoever, the lessors hereby agreeing to pay all taxes, rates, assessments, and impositions.

1871

THE QUEEN
v.
ST. GEORGE'S
UNION.

1871

THE QUEEN
v.
ST. GEORGE'S
UNION.

sitions, parliamentary, parochial, or otherwise, charged or to be charged on the premises. . . . And the lessors and lessee hereby mutually agree as follows:— The lessee, his executors, administrators, and assigns, will not do, or permit to be done, any damage or waste to the premises, and will, at least once in every two months during the term hereby granted, properly clean the windows of and belonging to the said demised premises, and will, as often as occasion requires during the term, repair, maintain, and keep the premises in such repair as that the same shall be at all times suitable and ready for the occupation of a tenant. And will at the expiration of the tenancy leave and deliver up possession of the same in such repair unto the lessors, or as they direct, together with chimney-pieces, and other fixtures, &c. . . . The lessee will not have or deposit any stores of coal or any combustible or offensive goods or materials on the said premises, or permit any of such things to be done. The lessee, his executors, administrators, or assigns, will not, without the lessors' consent, assign, underlet, or part with the possession of the premises or any part thereof, or any interest therein. The lessors or their agents shall at all times during the term hereby granted have liberty to enter upon the said premises for the purpose of painting the outside wood and iron work thereof, and may at all seasonable times enter and view the premises and examine the condition and use made thereof, and give notice of defects and wants of repair and misuser, all which shall be amended and corrected within one calendar month after such notice; but, nevertheless, without prejudice to any other right or remedy in respect thereof; nothing shall be done, or allowed in, upon, or with respect to the premises which may annoy or tend to the annoyance of the lessors or of any of the other tenants or occupiers or which may injure or tend to injure the character thereof as a place for residential, professional, or official chambers. In case of non-payment of the rent within twenty-one days after becoming due and demand made thereof, or on breach of any of the foregoing stipulations and articles, or on the bankruptcy of the lessee, his executors, administrators, or assigns, the lessors may, without any previous notice, re-enter and resume possession of the premises, and put out all persons therefrom, but without prejudice to any right or remedy for any such non-payment or breach.

Memorandum.—The premises are taken by the lessee, subject to the regulations made by the lessors with respect to the duties of the porter, the supply of coal, and other matters for the general convenience of the tenants. These regulations are set forth in the schedule to this agreement, and are to be considered as forming part. The lessors, however, reserve to themselves the right of altering and modifying these regulations from time to time as the convenience of the tenants or other special circumstances may render desirable.

The schedule of regulations made by the directors in respect of supply of coals, cleaning rooms, &c.—

There are seven entrances to the building, and the care of each entrance, and the rooms connected therewith, will be in the charge of a resident porter appointed and removeable by the directors.

There are duplicate keys to the outer door of every set of chambers, one of which is to be always in the hands of the porter, the other in the care of the tenant while the rooms are in use.

The tenants have the right, free of charge, to the general services of the porter within the scope of his general duties as hereinafter defined.

Tenants have the right to the special services of the porter as hereinafter defined upon the terms hereinafter mentioned.

Coals are supplied by the directors at a charge of threepence halfpenny per measure of 900 cubic inches, and wood at one penny for each fire lighted, and gas is brought to the entrance of each set of rooms, and may be laid on by the tenants at their own expense if desired.

Tenants are not allowed to have stores of coals in their rooms.

The general duties of the porter, and which are to be performed free of charge to the tenants, are as follows:—To be constantly in attendance in the section of the building committed to his charge, either by himself, or in his temporary absence, by some trustworthy assistant. To cleanse every morning before nine o'clock the general stairs, passages, lifts, and entrances attached to the section, and to attend to the lighting and extinguishing of the gas therein. To receive and deliver to the several tenants all letters, parcels, and messages, and to receive the keys of the outer doors of the several sets of rooms from the tenants on their leaving for the night. To attend to the regular and proper supply of coals to the several apartments.

The special services of the porter, which he is bound to render to the several tenants, if required, at a charge of 1s. 6d. per week for each room, comprise the cleansing and arrangement of each such room and the lighting of the several fires whenever required.

Any extra services, required of the porter by the tenants, and which are not inconsistent with his general duties, are to be subjects of special arrangement.

Any services, whether special or extra, so rendered by the porter, will be rendered as the servant of the tenant, and for which, or the consequences thereof, the association will not be responsible.

4. The outer or street door to each block of building is kept locked at night; and a porter, who is hired by the appellants, resides in a distinct set of rooms in the basement of each block of building, and has a key of, and access to, the suites or sets of rooms in such building for the purpose of a general superintendence, and as the servant of the occupiers respectively, by whom he is in some cases employed and paid for looking after the rooms.

5. The Westminster Improvement Act, 1853 (16 & 17 Vict. c. clxxvi.), s. 69, applies to the appellants, and enacts, that where any house erected on land of the commissioners shall be occupied or be intended to be occupied by different persons in distinct sets of apartments, the commissioners, their successors, or assigns may, if they shall think fit so to do, demise or sell any set of apartments separately from the rest of the said house.

6. The appellants provide gas for the staircases, halls, and passages, and water for the entire buildings, and pay all rates and taxes in respect thereof, charging their tenants higher rents in consequence.

1871

THE QUEEN
v.
ST. GEORGE'S
UNION.

1871

THE QUEEN
v.
ST. GEORGE'S
UNION.

7. Upon the same facts the commissioners of assessed taxes had, under 48 Geo. 3, c. 55, stated a case for the opinion of two of the judges as to whether the assessment of the Westminster Chambers to the house duty should be on seven blocks of building, or on such suite or set of rooms, as distinct properties according to rule 14 of schedule B. of that Act. And the judges had decided that the Westminster Chambers should be assessed in seven blocks.

8. The appellants contended that the Westminster Chambers ought to be assessed in the valuation list as seven hereditaments only, relying on the above decision of the judges. The respondents contended that that decision had no bearing on this case, and that the Westminster Chambers were correctly assessed in the valuation list by treating each of the suites or sets of rooms as a rateable hereditament.

9. The General Assessment Sessions decided that the chambers ought to be assessed as seven hereditaments, and ordered that the valuation list be altered by striking out the separate valuation of each suite or sets of rooms, and inserting, in lieu thereof, a separate valuation of each of the seven blocks of building; subject, nevertheless, to a case for the opinion of the Court of Queen's Bench on the question whether the Westminster Chambers ought to be separately valued in the valuation list in suites or sets of rooms as distinct separate rateable hereditaments, or in seven blocks of building. The question of value being reserved till after the decision of the Queen's Bench.

Poland, for the appellants, in support of the order of sessions. The question arises under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67). By the definition in s. 4, hereditament means any lands or tenements liable to any rate or tax in respect of which the valuation list is by the Act (s. 45) (1) made conclusive. And the question is whether each of these sets of chambers is a rateable hereditament, and as such ought to be separately inserted in the valuation list, or whether each block only ought to be inserted (2).

(1) See ante p. 86.

(2) 32 & 33 Vict. c. 67, s. 51. The valuation list shall be made out in the form given in the second schedule

to this Act. The overseers shall not include in such valuation list any hereditaments (except tithes or payments in lieu of tithes), which are

This question has already been determined by two judges with relation to the inhabited house duty (see par. 7), which is one of the taxes mentioned in s. 45.

[BLACKBURN, J. The decision is very probably right on the construction of the rules in schedule B to 43 Geo. 3, c. 48, as the judges seem to have decided that the case came under rule 6 and not under rule 14; but the poor-rate is one of the rates of most importance, and those rules have no application to rating to a poor-rate. Moreover, if the decision were in point it could not be binding on this Court; the opinion of the judges is given without any argument.]

The decision is conclusive as to the rating to inhabited house duty, and it would be very inconvenient if each of these sets of chambers is to be assessed in this valuation list, and yet the whole block only to be assessed to the house duty.

[BLACKBURN, J. Why so? the aggregate of the values of each set will be the value of the whole block. The contrary practice would be much more inconvenient; suppose each of these sets rateable to the poor-rate, and the value of the whole block only inserted: how are the overseers to apportion the value for the poor-rate on each of the sets, when, of course the value will vary? Is it not really a question of fact, who is in the occupation of these chambers, the tenant of each, or the landlords of the whole block? There is nothing to shew that the landlords are in occupation, except the fact of there being a common porter at the entrance door.]

He is the servant of the landlords, and is appointed by them.

[*Manisty, Q.C.*, *contra*, pointed out that the porter was stated in par. 4 to be the servant of the occupiers.]

He is the servant of the occupiers for certain purposes; just as the servant in a lodging-house does certain services for the lodgers. The tenants of these flats are in effect merely lodgers. The porter has the key of the street entrance, and he also has one key of

1871
THE QUEEN
v.
ST. GEORGE'S
UNION.

charged according to rule 2 in s. 60 of the Income Tax Act, but shall include tithes and payments in lieu of tithes, and every hereditament in their parish, and shall enter every hereditament in the valuation list in accordance

with the classes mentioned in the third schedule to this Act, so that the deductions to be made in ascertaining the rateable value may be calculated in accordance with that schedule.

1871
THE QUEEN
v.
ST. GEORGE'S
UNION.

each set of rooms "for the purpose of a general superintendence," which must mean on behalf of the landlords.

[COCKBURN, C.J. The case is very like the case of apartments in Paris where there is a concierge at the bottom who takes care of the whole place, but each set of apartments is separately occupied, just as they are here.

BLACKBURN, J. The principle of these cases was much discussed in this court in *Smith v. St. Michael's, Cambridge* (1), and in the very recent case of *Roads v. Trumpington*. (2) The present case is precisely analogous to chambers in the Inns of Court.]

In the Inns of Court there is no outer door at the bottom of the staircase, so that the tenants have perfectly free ingress and egress.

[BLACKBURN, J. But the outer gates, which correspond to the street door in this case, are locked, after a certain time, and no occupier of chambers is admitted in a carriage unless he is a benchman or a member of parliament.]

There is a great deal more than the mere control of the outer door in the present case. In the first place the porter has a duplicate key of each set of chambers for the purpose of a general superintendence, as has already been pointed out, so that the landlords can enter at any time.

[BLACKBURN, J. Is that so? The agreement is in the common form of a demise, with the reservation of a right of entry at certain times only, or on non-payment of rent. Supposing the landlords to enter, or to prevent the tenant from entering his set of rooms, would he not be able to maintain an action of tort, and not merely, like a lodger, an action for a breach of the agreement?]

The tenants are merely in the position of lodgers in unfurnished apartments. By the agreement and regulations, the landlords are to supply coals and other materials daily for lighting and keeping up the fires, which materials are to be carried up by the porter. The cases in the Court of Common Pleas as to the occupation of houses for the parliamentary franchise are in point, such as *Henrette v. Booth* (3), *Cook v. Humber* (4), and *Pitts v. Smedley*. (5)

(1) 3 E. & E. 383; 30 L. J. (M.C.) 74.

(2) Law Rep. 6 Q. B. 56.

(3) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61. *9 Jan 45. 1293*

(4) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73. *8 Jan 45. 698*

(5) 7 M. & G. 85.

[COCKBURN, C.J. In those cases the question was whether the subject-matter of occupation was a house or only part of a house; the facts in all are quite distinguishable from the present.]

1871
THE QUEEN
v.
ST. GEORGE'S
UNION.

In all, the criterion was whether the landlord was in occupation by himself or his servant by reason of his keeping the control of the outer door.

[MELLOR, J. It is a mistake to assume in the present case that the landlords had any control of the outer door; the porter, no doubt, had the key; but it is nowhere said that he exercised any control over the door on behalf of the landlords.]

Manisty, Q.C., and *F. T. Streeten*, for the respondents, were not heard.

COCKBURN, C.J. The case is a very clear one, and I entertain no doubt whatever that every one of the occupiers of these distinct tenements, 117 in number, is rateable to the poor, and to other rates to which occupiers are liable, and that consequently a valuation of each of these separate tenements in the assessment list is the right course, and that the alteration of the original list was an error which we must set right.

The question is, whether the occupiers of each of these tenements or the lessors are rateable in respect of the whole of any one of these blocks. The question in these cases of course always is whether there is an occupation of a distinct and separate tenement by a person who inhabits a portion of a house or building, or whether he is merely an inmate under the landlord.

It is necessary to establish some criterion, and it is not always, perhaps, very easy to find one; but the one which has been adopted in such cases, and which is, perhaps, the most convenient, and the only one, is, whether the landlord retains the control of the outer door, and has shewn by his retaining the control of the outer door that he has the control of the whole of the premises; so that, although he may be liable to an action upon the breach of his contract to allow the tenant to occupy a portion of the premises so let to the tenant, yet the tenant could not maintain trespass against the landlord, because the landlord has retained in himself the dominion and control over the whole of the house. I think the possession of the street door may be taken as a criterion, because

1871

THE QUEEN
v.
ST. GEORGE'S
UNION.

it is only by the landlord opening and shutting the street door, or allowing it to be opened and shut for the ingress and egress of the tenant, that the tenant can have the enjoyment of the premises.

If, in the present case, I could see that the landlords had retained the exclusive control of the outer door, so that the tenants could only come in and go out with their assent and permission; then it might be said that these persons were mere inmates or lodgers, and not the lessees of the respective tenements. In order to determine that question it is necessary to look at the agreement. I look to that and nothing else, and I see that all the characteristics of a lease and a tenancy under a lease are, as my Brother Blackburn pointed out in the course of the argument, contained in this agreement. The landlords have not reserved to themselves directly or indirectly, expressly or by implication, any right to go into the apartments of any of these people. It is true that for the common protection and common convenience of all, there is to be a porter, and the porter is to have a key of every one of these sets of apartments, in order that if the necessity should arise, he may be able to get access to them. But the more I look at the agreement the more I am satisfied that the porter is there only for the convenience and benefit of the tenants, the occupiers of these separate and distinct sets of apartments, and that he is not there for the purpose of securing to the landlords the entire control over the whole of these premises, so as to give the landlords the right at any time to go upon the premises without being subject to an action of trespass. It is expressly stipulated, on the part of the lessors, that they shall, at given times, and for given purposes, have access to those different sets of chambers. Would there be that stipulation if they already had control or general dominion over the whole of the house which is thus divided into separate occupations?

Then it is said that the porter is to retain the keys when the tenants go away at night. Many of these chambers are used as offices and places of business, and the occupiers go away at night, and the porter is bound, as their servant, not as the servant of the landlords, in addition to receiving their letters and parcels, and handing them over, to receive the keys at night for their convenience; but if a man likes to take away his key in his pocket there is nothing to prevent him doing so.

Looking to the whole scope of the agreement I cannot see that there is anything which makes the porter anything other than the servant of these occupiers. It seems to me, therefore, that the case fails in that which is the point upon which many of these cases have been decided; namely, that it does not appear on the whole that the landlords retained that control either over the house generally, or the front door of it, which would make the tenant liable to be excluded at their will, subject only to a right of action on the contract if the landlords refused him access. The case fails in that particular, and as that is the criterion, and the acknowledged criterion, it is wrong to say that these houses are to be assessed in blocks so as to make the lessors liable. That is what we have to determine, and that is the necessary corollary from the proposition for which Mr. Poland has been contending. If these premises are not separately assessable then the lessors are liable to be assessed with respect to the whole of the houses, and to pay the rates; but when was it ever said that a landlord who does not reside, and who does not keep the exclusive control of the outer door, is liable to the rates?

I think, therefore, that the original assessment of these tenements was right.

BLACKBURN, J. I am of the same opinion. In this case the duty of the assessment committee is to assess each "hereditament," which by the definition (s. 4) of the Act means "any lands, tenements, hereditaments, and property which are liable to any rate or tax in respect of which the valuation list is by this Act made conclusive." If, therefore, each set of chambers is liable to the poor-rate, if the occupier is rateable, the committee ought to put a value upon it, so that the value at which that occupier is to be rated shall be fixed and found in the valuation list. If, on the other hand, the occupiers of these chambers ought not to be rated, but the owners of the entire block of buildings continue occupiers of the chambers so as to be rateable for the one entire thing, then, doubtless, it would be improper to value each of the sets of chambers separately, and the valuation ought to be for the entire block. If, for instance, the case was like one of the large hotels, such as the Palace Hotel at Westminster, which, I believe, is partly

1871

THE QUEEN
v.
ST. GEORGE'S
UNION.

1871
THE QUEEN
v.
ST. GEORGE'S
UNION.

occupied in a similar way, yet there is no doubt that the landlord occupies the whole hotel and the occupiers of the sets of rooms are so many lodgers, the landlord would be rateable for the whole hotel, and therefore there ought to be a value put upon it as a whole.

The question, therefore, is, are these sets of chambers separately occupied? I take it that there is no doubt, in point of law, that the landlord or the owner of the fee-simple of an entire house may, if he pleases, agree with another that he will let him a portion of the house, and a portion only. But whether he does so agree or not depends upon the terms of the agreement. If it is in writing we can judge of the terms of it; if it is not in writing, and the letting is by parol, we must gather the terms of the agreement from the different matters of fact given in evidence to shew whether or not the agreement was such as to put the lessee in exclusive occupation, or merely an agreement to let to him as a lodger or inmate, the occupation of the whole of the house being retained in the landlord.

I think that all the registration cases on this point, and they are very numerous, come simply to this: where there is not an actual demise in writing which we can construe as a matter of law, the Court are to determine the question of fact, whether or not there was a separate demise, or merely an agreement to allow the tenant to come in while the occupation remained in the landlord. I think, upon this point, when the agreement is not in writing, the possession of the outer door is of the highest importance. I do not think any one of these cases goes a bit further than that. But where there is an actual agreement in writing between the parties, the construction of that agreement will be for the Court. There were two cases to which Mr. Poland's attention was directed, but as to which he avoided saying anything, which seem to me to lay down the law perfectly rightly, and directly contrary to the contention of the appellants in the present case. The first was the case of *Smith v. St. Michael's, Cambridge* (1), which came on before Sir Hugh Hill and myself, the only two judges then present, and Sir Hugh Hill delivered the judgment. There the question was whether or not certain premises which the Inland Revenue occupied, in a house in Cambridge, were occupied by the servants

(1) 3 E. & E. 383; 30 L. J. (M.C.) 74.

of the Crown, in which case they could not be rated at all, or were occupied by the owner of the house, who had merely got the Crown for its inmate or lodger. Hill, J., in delivering judgment, says: "We took time to consider whether the appellant was to be considered occupier of the whole of the house in respect of which he was rated, or whether five rooms and a closet were in the occupation of the Commissioners of Inland Revenue. There is no doubt that exclusive possession of a part only of a house may be given, so as in effect to make the two parts of the house separate tenements: the question in the present case was, whether such possession had been given, and we are of opinion that it had not. The agreement between the appellant and the representatives of the Commissioners of Inland Revenue is set forth in the case. By it the appellant contracted to give to the Inland Revenue the exclusive enjoyment of five rooms and a closet in his house, and in the agreement it is expressed that the appellant 'agrees to let,' and the other party takes the rooms, and it is stipulated that 'possession' shall be given and rent commence at a particular time; all of which are words properly applicable to a demise of the five rooms. But at the same time it is stipulated 'for the annual consideration of 90*l.*; this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same.' We think that we must look, not so much to the words as the substance of the agreement; and taking the whole together we think it must be construed, not as a demise of the five rooms, but as an agreement by which the appellant, retaining possession of those rooms and keeping his servant there, bound himself to supply the other party there with fire, gas, and attendance." There the question is put upon the true test, upon the construction of the document, looking not so much to the words as to the substance. There we thought that the appellant kept possession, entire possession, of the house, and stipulated with the Crown that he, keeping possession, would for a consideration let them in as inmates or lodgers.

The other case I referred to was *Roads v. Trumpington*. (1) I think I need not refer to any particular words in that, it is sufficient to state the effect of it. There there was also an agreement as to the

1871

THE QUEEN
v.
ST. GEORGE'S
UNION.

(1) Law Rep. 6 Q. B. 56.

1871

THE QUEEN
v.
ST. GEORGE'S
UNION.

terms upon which there was to be possession of the property, and what the Court said was, this agreement shews clearly that there was to be exclusive possession given to the lessee; the words of possession and the words of letting are all pointing to that. There is nothing to the contrary, and therefore this possession would be exclusive possession; consequently there the lessee was not a lodger but an occupier, and as such was held rateable.

Now let us look at the agreement set out in the present case, and see whether it can for a moment be contended that it was not the intention of the parties that the Tontine Association, who were the landlords, should part with the exclusive possession of these chambers to the tenants. "The lessors hereby let, and the lessee hereby takes, all the premises numbered" so-and-so, "of the chambers belonging to the association, together with the use of the water-closet and washing-closet attached thereto; and also the use, in common with other tenants, of the entrance-hall and stairs, and lift leading to the same premises," for the term of so many years from such and such a day, subject to notice to quit, and so on, the rent to be payable on the usual quarter-days, free from all deductions. Then subsequently, in the agreement, this power is given. "The lessors, or their agent, shall at all times during the term hereby granted have liberty to enter upon the said premises, for the purpose of painting the outside wood and iron work thereof." Can it be for a moment contended that when the lease says, "We let the premises to you for a term of years at a yearly rent, reserving to ourselves the power to enter for the purpose of painting the outside, the tenant having to keep them in order internally," it was not intended that the exclusive possession should be parted with?

But the agreement goes on further than that: "In case of non-payment of the rent within twenty-one days after becoming due and demand made thereof, or on breach of any of the foregoing stipulations or articles, or on the bankruptcy of the lessee, his executors, administrators, or assigns, the lessors may, without any previous notice, re-enter and resume possession of the premises." Words cannot be stronger to shew that the lessors had agreed to put themselves out of possession of the premises.

Then it is said that, although that is their agreement, the fact that the lessees had only an easement in the staircase, and that

there was an outer door which the porter (who belonged to the landlord, and had one key of the chambers,) was to shut, they did not mean to part with the possession. It seems to me that would be monstrous; and I think it clear, upon the true construction of the agreement, that there was exclusive occupation given of each of these sets of chambers, and consequently the occupier is rateable, and each set should be assessed in the valuation list.

It is said that that is inconsistent with the decision of the two judges who decided upon the inhabited house duty under 48 Geo. 3, c. 55. As at present advised, I am not at all inclined to say that that decision was not quite right, because rule 6 in the schedule seems to shew that, where a house belongs to one owner, and is occupied by different persons, the owner shall in that case, for the purposes of the house-tax, be deemed the occupier, and shall be charged; and the 14th rule applies to cases where there are different owners. Therefore, I am far from being inclined to think that the judges who decided that did not decide it perfectly rightly; but all they decided was, what did the rules as to the house-duty mean, which are in perfectly different words and in a perfectly different Act from the present, and therefore their decision is in no way in point in the present case.

MELLOR, J. I am entirely of the same opinion. We must look at this agreement, and to the fact that the association have power, under the Westminster Improvement Act, wherever a house is to be occupied by different persons in distinct sets of apartments, if they shall think fit, to demise or sell any set of apartments separately from the rest of the house. What do they proceed to do? I will not repeat the observations of my Brother Blackburn on the contract; but I may say, that the stipulations are such as are in general to be found in the lease of a house, as to which there can be no doubt whatever that it is a separate and distinct house. The lessees are to paint, to repair, and to leave the premises in repair fit for an incoming tenant. They are to leave the fire-places and all fixtures; and then there are the usual powers of re-entry to the lessors. But this last provision, if Mr. Poland's contention is right, that the association have not given up possession, and that the porter is only, after all, the

1871

THE QUEEN
v.
ST. GEORGE'S
UNION.

1871
 THE QUEEN
 v.
 ST. GEORGE'S
 UNION.

servant and representative, would, as it seems to me, be entirely unnecessary. There is nothing in the terms of the agreement to militate against it being a demise in the ordinary sense. On the contrary, all of them seem to shew that it was the intention that these various lessees should occupy separately and distinctly. They have certainly to share with the other tenants certain conveniences; but I think it is quite a mistake to say that the porter is the representative of the lessors; he is appointed by them, but he is so appointed because it is a convenient arrangement where houses are let in different sets of apartments or rooms that there should be a porter appointed by some one. There might be a difference of opinion as to the choice of a porter if it was left entirely to the tenants, and therefore the lessors reserved the power of appointing him. But there is no duty which the porter performs which is inconsistent with its being a separate and distinct tenancy on the part of the persons who occupy. I do not think he is in any sense the representative of the lessors; he is intended to be the servant to do various kinds of services for the holders and occupiers of these rooms. He may be employed by them specially, if they choose to pay the remuneration which is fixed for any separate or distinct service; but so far as the general duties of the porter are concerned, they are not only consistent with his being the tenants' servant, but are a matter of convenience, which would induce people the more readily to take a set of rooms in this building.

I think, therefore, there is really nothing to shew that each set of rooms is not the subject-matter of an assessment; and this is consistent with all the authorities, so far as I know; and though there may be cases in which nice points may arise as to the control of the outer door, Mr. Poland has, throughout, erroneously assumed that the control of the outer door is in the lessors. That is quite a mistake, as it seems to me, and there is no foundation for it in the facts stated for our opinion.

Under these circumstances, I think that the original valuation list was right.

Order of Sessions quashed; Valuation List affirmed.

Attorneys for appellants: *Burchells.*

Attorneys for respondents: *Capron, Dalton, & Hitchins.*

WILSON, APPELLANT; THE MAYOR, ALDERMEN, AND BURGESSES OF
BOLTON, RESPONDENTS.

1871
Nov. 15.

Public Health Act, 1848 (11 & 12 Vict. c. 63), ss. 69, 90—Local Government Act, 1858 (21 & 22 Vict. c. 98)—Local Government Amendment Act (24 & 25 Vict. c. 61), s. 23—11 & 12 Vict. c. 43, s. 11—Private Improvement Expenses—Summary Proceedings to recover Expenses of Execution of Works—Election to adopt Remedy.

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By s. 69 of 11 and 12 Vict. c. 63, in case any street, not being a highway, be not sewered, &c., to the satisfaction of a local board of health, such board may require the owners of the adjoining premises to sewer, &c., the same within a time to be specified; and upon default of the owners, the board may execute the works, and the expenses shall be paid by the owners in default in such proportion as shall be settled by the surveyor to the board; and such expenses may be recovered from the owners in a summary manner, or may be declared by the board to be private improvement expenses. By s. 90 the local board may levy upon the occupier of the premises, in respect of which private improvement expenses have been incurred, rates sufficient to discharge such expenses. The respondents, a local board of health, under s. 69 of 11 & 12 Vict. c. 63, executed certain works, and apportioned the costs among the owners, of whom the appellant was one. The works were completed in November, 1860; and in January, 1861, the respondents demanded from the appellant payment of his proportion of the costs. This amount not having been paid, on the 25th of August, 1870, the respondents resolved that it should be deemed private improvement expenses. In September, 1870, the respondents declared these expenses should be paid by annual instalments. A demand having been made on the appellant, he refused to pay, and was summoned before justices:—

Held, that as the respondents had in January, 1861, demanded from the appellant payment of his proportion of the costs, they had elected to treat the amount due as a debt from him as owner; and that they could not afterwards, in September, 1870, declare them to be private improvement expenses.

CASE stated by Justices of Bolton, under 20 & 21 Vict. c. 43.

The justices made an order on the appellant to pay the sum of 6*l.* 13*s.* 4*d.*, being the first instalment of a sum of 13*l.* 6*s.* 8*d.*, declared by order of the local board of health for Bolton to be paid as improvement expenses under ss. 69 and 90 of 11 & 12 Vict. c. 63 (1), and payable by instalments under 24 & 25 Vict. c. 61, s. 23.

(1) 11 & 12 Vict. c. 63, s. 69: "That in case any present or future street, or any part thereof (not being a highway) be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the

local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be

1871

WILSON
v.
MAYOR OF
BOLTON.

The respondents are the local board of health for the borough of Bolton. The appellant was, in the year 1857, and is, the owner within the meaning of the Public Health Act, 1848, of certain

sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice. And if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

Sect. 90: "That whenever the local board of health have incurred or become liable to any expenses which by this Act are, or by the said local board shall be declared to be, private improvement expenses, the said local board may, if they shall think fit, make and levy upon the occupier of the premises in respect of which the expenses shall have been incurred (except in the cases hereinafter provided), in addition to all other rates, a rate or rates to be called private improvement rates, of such amount as will be sufficient to discharge such expenses, together with interest thereon at a rate not exceeding five pounds in the hundred, in such period not exceeding thirty years as the said local board shall in each case de-

termine: Provided always, that whenever any premises in respect of which any private improvement rate is made shall become unoccupied before the expiration of the period for which the rate was made, or before the same is fully paid up, such rate shall become a charge upon, and be paid by the owner of, the premises so long as the same continue to be unoccupied."

21 & 22 Vict. c. 98, s. 63: "Notwithstanding anything in the Public Health Act contained, in all cases where, by such Act, the local board shall have incurred expenses, for the repayment whereof the owners of the premises for or in respect of which the same are incurred is made liable by the Public Health Act, 1848, or any Act incorporated therewith, or by this Act, and such expenses have been settled and apportioned by the surveyors as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless, within the expiration of three months from the time of notice being given by the local board or their surveyor of the amount of the proportion so settled by the said surveyor to be due from such owner, he shall by written notice dispute the same."

24 & 25 Vict. c. 61, s. 23: "The expenses which have been incurred by any local board of health as and for private improvement expenses under the Public Health Act, 1848, as also the expenses stated in the 62nd section of the Local Government Act, 1858, to be a charge on the premises, with interest after the rate of five per centum per annum, may, by order of the local board of health, be declared payable by

premises abutting upon a private street within the district of the respondents.

The street not being sewered, levelled, paved, flagged, and channelled to the satisfaction of the respondents, they, as such local board of health, and in pursuance of the Public Health Act, 1848, s. 69, gave the appellant and other owners notice that the board required them to do such sewerage and other works before the 1st day of September then next. The notice was duly served upon the appellant in July, 1858; and he having made default, the respondents executed the works, and the surveyor duly apportioned the costs of such execution among the respective owners, including therein the amount of the appellant's proportion thereof, which was in the whole the sum of 13*l.* 6*s.* 8*d.* The works were completed by the respondents on the 30th of November, 1860, and the apportionment by the surveyor was made on the 21st day of January, 1861, and on that day the respondents delivered to the appellant an account of his proportion of the costs:—

“21st January, 1861. “Mr. Nathaniel Wilson, St. George's Road, to the Mayor, Aldermen, and Burgesses of the Borough of Bolton. Dr.

“Notice. Unless the amount of this account is paid within fourteen days after delivery, interest at the rate of 5*l.* per centum per annum will be charged thereon until fully liquidated.

“1860. November 30. To proportion of sewerage, levelling, paving, flagging, and channelling, &c., viz., 50 feet of frontage, 13*l.* 6*s.* 8*d.*”

On the 25th of August, 1870, the respondents resolved and declared, under s. 69 of 11 & 12 Vict. c. 63, that the amount of 13*l.* 6*s.* 8*d.* should be private improvement expenses.

On the 4th of September, 1870, the respondents, under authority of s. 23 of 24 & 25 Vict. c. 61, declared that the said expenses

annual instalments, with interest after the rate aforesaid, during a period not exceeding thirty years, until the whole amount be paid; and any such instalments and interest, or any part thereof, may be recovered from the owner or occupier of such premises in the same

manner as general district rates, and may be deducted from the rent of such premises in the same proportions as are allowed in the case of private improvement rates under the 91st section of the Public Health Act, 1848.”

1871

WILSON
v.
MAYOR OF
BOLTON.

1871
 WILSON
 v.
 MAYOR OF
 BOLTON.

should be paid by annual instalments of 6*l.* 13*s.* 4*d.*, with interest after the rate of 5*l.* per cent. per annum ; the first payable on the 15th of September, 1870, and the last on the 15th of September, 1871.

On the 12th of January, 1870, the respondents caused a demand in writing to be served upon the appellant, requiring him to pay 6*l.* 13*s.* 4*d.*, the amount of the first instalment of the expenses, within fourteen days of such notice.

On the expiration of the fourteen days, the respondents caused application for payment of the said 6*l.* 13*s.* 4*d.* to be made to the appellant, but he refused to pay.

At the hearing it was objected for the appellant that as the works had been completed, and the apportionment made in the years 1860 and 1861, the lapse of time prevented the respondents now recovering the amount, inasmuch as s. 11 of 11 & 12 Vict. c. 42, ousted the justices of jurisdiction after the expiration of six calendar months from the date of apportionment of the expenses, being the time when the matter of complaint arose ; and that as if the amount had been sought to be recovered in a summary way, proceedings must have been commenced within six calendar months of the cause of complaint arising, so a similar limitation must be held to apply when, under the same section, the local board elected to treat the amount as private improvement expenses.

The question for the opinion of the Court was, whether it was competent to the local board, on the 25th of August, 1870, to declare the expenses private improvement expenses, although the works were completed in the year 1860.

Baylis, for the appellant, contended that the notice of the 21st of January, 1861, was a demand of payment of the costs of executing the works, and that the local board ought to have taken proceedings to recover the amount therein mentioned within nine months after the expiration of fourteen days from the 21st of January, 1861, it being admitted that the period of six months, under 11 & 12 Vict. c. 43, s. 11, must be calculated from the expiration of three months, during which the owner of the premises charged might dispute the apportionment under 21 & 22 Vict. c. 98, s. 63 : *Jacomb v. Dodgson* (1) ; *Eddleston v. Francis*. (2) That on

(1) 3 B. & S. 461 ; 32 L. J. (M.C.) 113.

(2) 7 C. B. (N.S.) 568.

gfm A.L. 848

giving such notice the local board had made their election to proceed against the owner of the premises, and that they could not afterwards declare the expenses to be private improvement expenses recoverable by annual instalments.

Edwards, for the respondents, contended that the notice of the 21st of January, 1861, was a notice of apportionment merely, and that no demand had been made on the appellant until the 12th of January, 1870, and the time within which the local board could enforce payment was to be calculated from that date. That the local board might declare at any time the costs of executing the works to be private improvement expenses, as no limit was fixed by any of the Acts.

Baylis was heard in reply.

LUSH, J. I am of opinion that our judgment should be for the appellant. The respondents completed the works in November, 1860, and after the amount of the expenses had been apportioned by the surveyor, an account was delivered to the appellant, to which was attached a notice in these terms:—"Unless the amount of this account is paid within fourteen days after delivery, interest at the rate of 5*l.* per cent. per annum will be charged thereon until fully liquidated." It was contended that this notice did not constitute a demand of payment. I do not accede to this. No one can understand the notice in any other sense than as a demand of payment. There was therefore a demand of payment of a sum apportioned by the surveyor as the contribution of the appellant as owner of the premises for the execution of the work. That notice was served on the appellant in January, 1861; but no proceedings were taken to enforce the payment, and no payment was ever made. Ten years afterwards the respondents make an order ordering that this amount shall be paid as private improvement expenses. Under s. 69 of 11 & 12 Vict. c. 63, in the event of the local board executing the works on default of the owners the expenses are to be paid by the owners in such proportion as shall be settled by the surveyor, and the local board has the option of recovering these expenses from the owners in a summary manner, or the same may be declared by order of the local board to be private improvement expenses and be recoverable as such

1871

WILSON
v.
MAYOR OF
BOLTON.

1871

WILSON
v.
MAYOR OF
BOLTON.

“in the manner hereinafter provided.” Then “the manner hereinafter provided” is the subject of s. 90, which enacts that whenever the local board of health have incurred or become liable to any expenses which shall be declared to be private improvement expenses, the local board may, if they shall think fit, make and levy upon the occupier of the premises in respect of which the expenses shall have been incurred (except in the case hereinafter provided), in addition to all other rates, a rate to be called private improvement rates, of such amount as will be sufficient to discharge such expenses, together with the interest thereon at a rate not exceeding 5*l.* in the 100*l.*, in such periods not exceeding thirty years. Then the proviso is, that whenever any premises in respect of which any private improvement rate is made become unoccupied before the expiration of the period for which the rate was made, or before the same is fully paid off, such rate shall become a charge upon and be paid by the owner of the premises so long as the same continue to be unoccupied. Therefore the board had the option, in the year 1860, when these works were executed, if they pleased, of making an order that the expenses should be recovered as private improvement expenses running over a period of thirty years. In that case they would be payable by the occupier, who would have a right to deduct a part of the amount out of the rent he paid to the owner. These provisions intended that the instalments should be paid by means of a rate. Then comes the Amendment Act of 1861 (24 & 25 Vict. c. 61), s. 23, which seems to dispense with the rate. It enacts, that the expenses which have been incurred shall be a charge on the premises with interest after the rate of 5 per cent. per annum, and may, by order of the local board of health, be declared payable by annual instalments, with interest, during a period not exceeding thirty years, until the whole amount be paid, and any such instalment and interest, or any part thereof, may be recovered from the owner or occupier of such premises in the same manner as general district rates.

The question is at what time are the local board bound to exercise their option under s. 69 of 11 & 12 Vict. c. 63? If they do not declare the amount to be recoverable as private improvement expenses, then it is recoverable in a summary manner as a

debt due from the owners. It is not necessary to decide at what time they are to make their option in cases where they have made no demand on the owner for payment of the amount. It appears here the local board did elect to treat it as a debt due from the owner, for they demanded payment within fourteen days. Now the 11 & 12 Vict. c. 43, s. 11, provides in effect that the summary application for the recovery of money shall be made within six calendar months; and the 21 & 22 Vict. c. 98, s. 63, in effect allows three months to the owner to dispute the surveyor's apportionment of expenses, which three months are to run from the time of notice being given by the local board of the amount of the proportion settled by the surveyor as payable by the owner. Therefore, at the expiration of nine months from the time at which the notice demanding payment was served upon the appellant, the right of the local board to take summary proceedings to recover the sum due from the appellant was barred. Here, again, it is not necessary to determine whether, having made that demand, they could afterwards, without the consent of the owner and within the nine months, change their minds and make an order declaring that the appellant's proportion of the costs of the works should be private improvement expenses. The local board let the nine months elapse, and thereby the limitation imposed by Jervis' Act, followed by the Public Health Act of 1861, disabled them from taking any proceedings to recover it. Then, having elected to treat it, not as private improvement expenses, but as a debt payable by the owner, recoverable in a summary way, and having allowed the time for taking summary proceedings to pass, they are after that period precluded from reviving that claim by an order declaring the appellant's proportion to be private improvement expenses, and therefore payable by instalments. For these reasons I am of opinion the order of the justices is invalid.

HANNEN, J. I am of the same opinion. It is quite clear that the respondents cannot proceed in a summary manner and also declare the costs of executing the works to be private improvement expenses. Then, if they are not entitled to adopt both methods of obtaining payment, there must be a time when their election to take one course will be considered irrevocable.

1871

WILSON
v.
MAYOR OF
BOLTON.

1871

WILSON
v.
MAYOR OF
BOLTON.

I agree with my Brother Lush that the notice of January is a demand of payment; it is directed to the owner, and treats the sum of 13*l.* 6*s.* 8*d.* as a debt due from him; whereas, when the costs of executing works are declared to be private improvement expenses, the liability to pay is thrown in the first instance on the occupier. I think that the election as to the mode of proceeding was made when the notice was served on the owner, and the local board adopted a mode of recovering the costs under which, in default of payment, they would be bound to take summary proceedings; they had no longer an option, after they had failed from their own dilatoriness, to claim the proportion payable in respect of the appellant's premises in a different manner, viz., as a sum that in the first instance is to fall upon the occupier.

Judgment for the appellant.

Attorneys for appellant: *Chester & Urquhart.*

Attorney for respondents: *C. E. Abbott.*

Nov. 29.

DAVIES AND WIFE v. SOLOMON.

*Slander of Married Woman—Imputation of Unchastity—Special Damage—
Action by Husband and Wife—Loss of Hospitality of Friends.*

116BD410 Declaration, by husband and wife, charged a slander imputing want of chastity to the wife, whereby she was "injured in her character and reputation, and became alienated from and deprived of the cohabitation of her husband, and lost and was deprived of the companionship, and ceased to receive the hospitality of divers friends, and especially of her husband," and others named, who had "by reason of the premises withdrawn from the companionship and ceased to be hospitable to or friendly with her":—

Held, on demurrer, that the loss of the hospitality of friends was the reasonable and natural consequence of the slander, and a loss to the wife herself of benefits which her husband was not bound to bestow upon her; and, therefore, that such loss of hospitality was special damage which would support an action by husband and wife.

DECLARATION by John Davies and Isabella Davies his wife, that the plaintiff Isabella had always conducted herself with decorum, chastity, modesty, and propriety, living and cohabiting with her husband, and was on terms of intimate relationship and companionship with her husband, and with divers good and worthy

friends, and was in the habit of visiting and partaking of their hospitality, and being received by them as a companion, yet the defendant, well knowing the premises, falsely and maliciously spoke and published of the plaintiff Isabella the words following, that is to say: "I can prove that John Davies' wife had connection with a man named Labrach two years ago, but I would rather have the tongue cut out of my mouth than separate man and wife," whereby the plaintiff Isabella was injured in her character and reputation, and became alienated from and deprived of the cohabitation of her husband, and lost and was deprived of the companionship and ceased to receive the hospitality of divers friends, and especially of her husband John Davies, "and one M. D. and one G. H. T. and one A. J. M.," who have by reason of the premises withdrawn from the companionship and ceased to be hospitable to or friendly with the plaintiff Isabella.

Demurrer and joinder in demurrer.

A. T. Lawrence, in support of the demurrer. The special damage alleged is too remote. It does not naturally follow the slander. The unchastity imputed may have been antenuptial. In *Lynch v. Knight* (1) the question whether a wife can maintain an action for words occasioning to her the loss of the consortium of the husband was discussed but left in doubt. Lord Wensleydale said: "I have made up my mind that no such action will lie . . . That the loss of the comfort of the society and attention of friends by a wrongful act does not support an action for slander is fully settled by the case of *Moore v. Meagher* (2); and the wife can have no right of action for a loss of the same character, though of a much higher degree, for the loss of that of her husband." (3)

[HANNEN, J. But loss of hospitality is laid as special damage in the present declaration.]

That is not the necessary consequence of the charge of unchastity. Lord Wensleydale thought that "the consequence must be such as, taking human nature as it is with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared

1871

 DAVIES
v.
SOLOMON.

(1) 9 H. L. C. 577. *See* 24

(2) 1 Taunt. 39.

(3) 9 H. L. C. at p. 599. *See* 2

1871
 DAVIES
 v.
 SOLOMON.

would follow from the speaking of the words, not what would reasonably follow, or we might think ought to follow." (1) Moreover, there must be a pecuniary loss to the wife herself, and the deprivation of the hospitality of friends is not such a loss to her, for her husband is bound to supply her with necessaries.

[BLACKBURN, J. But not with luxuries that friends might afford.]

In *Roberts v. Roberts* (2), by reason of words spoken of a wife imputing want of chastity to her, she was not allowed to continue a member of a religious society. This was held not to be sufficient damage to make the words actionable.

[BLACKBURN, J. For there was no temporal damage.]

Some specific damage must be proved. The injury here was to the pocket of the husband alone.

Prentice, Q.C., contra, was not heard.

BLACKBURN, J. The sole difficulty in deciding the case is caused by the opinion of Lord Wensleydale in *Lynch v. Knight*. (3) He held that no action would lie for slander of a wife when the only special damage alleged was the loss to the plaintiff of the consortium of her husband. In the present case, however, it is unnecessary to decide this question, for the declaration, after alleging the loss of cohabitation by the wife, proceeds to aver that "she lost, and was deprived of the companionship, and ceased to receive the hospitality of divers friends." Now, first, was that consequence such as might reasonably and naturally be expected to follow from the speaking of the slanderous words? Judging from the habits and manners of society, of all the consequences that might be expected to result from a statement that a woman had committed adultery, or had been guilty of unchastity, the most natural would be that those who had invited her and given her hospitality would thenceforth cease to do so. Then *Moore v. Meagher* (4) decides that the loss of the hospitality of friends is sufficient special damage to sustain an action like the present; and the hospitality, as the word is there used, means simply that persons receive another into their houses, and give him meat and

(1) 9 H. L. C. at p. 599. *8 June 25 732*

(2) 5 B. & S. 384; 33 L. J. (Q.B.) 249.

(3) 9 H. L. C. 577. *8 June 25 72*

(4) 1 Taunt. 39.

10 June 25. 1027

drink gratis. Perhaps such a definition may rather extend the signification of the word, but it is true in effect—for if they do not receive him, or if they make him pay for his entertainment, that is not hospitality. In *Roberts v. Roberts* (1), it is to be observed, that the loss suffered by the plaintiff in being excluded from a religious society, was not temporal, and was therefore held not to be enough. But in the present case there is a matter of temporal damage—small though it be—laid in the declaration. It is also argued, that inasmuch as this action is brought by the wife, the husband being merely joined for conformity, the damage necessary to give a right to recover must be damage to her alone, and that the loss of hospitality which she has hitherto enjoyed, is only pecuniary loss to her husband and not to her. That certainly is a plausible argument, as the husband is of course bound to maintain his wife and to supply her with food, although her friends cease to do so. I am, however, unwilling to agree with such artificial reasoning, and I think that the real damage in this case is to the wife herself. Notwithstanding that it is the husband's duty to support his wife, he is only bound to provide her with necessaries suitable to his station in life; and she might, by visiting friends in a higher position than himself, enjoy luxuries which he either could not or might not choose to afford her. But I should be sorry to say that we must enter into a nice inquiry as to whether such hospitality would save the purse of the husband or of the wife. I am therefore of opinion that the declaration is good; and the demurrer must be overruled.

MELLOR and HANNEN, JJ., concurred.

Judgment for the plaintiffs.

Attorney for plaintiffs: *George L. Norman.*

Attorneys for defendant: *Taylor, Hoare, & Taylor.*

(1) 5 B. & S. 384; 33 L. J. (Q.B.) 249.

10/11/16 27

1871

DAVIES
v.
SOLOMON.

1871

Dec. 11.

HANNAFORD AND OTHERS v. HANNAFORD AND ANOTHER.

Devise—Construction of Will—Cross Remainders.

7 Ex 345. A testator devised an estate, of which he died seised in fee, to his brother, W. H., for life, and after the decease of W. H., to the four sons of W. H., his nephews, for life as tenants in common; and after their decease he devised the share or shares of his said nephews respectively to their respective eldest sons, then living, for life; and after the decease of such eldest sons to the first and other sons of the latter successively in tail male. In default of issue of the eldest sons, he devised the same share or shares to the second, third, and other sons, then living, of his said nephews severally and successively, according to their respective seniorities, and to their issue in tail male in the same manner and for the same estate and estates as he had before given to the eldest sons of such nephews. Failing the issue of the sons then living, he devised to all and every the sons of his nephews hereafter to be born in tail male. After which the will proceeded thus: "And for default of such issue, I give and devise the same to my own right heirs for ever, it being my will and intention that the said lands shall go and remain in my name and family for ever, or so long as the law will permit such enjoyment of the same":—

Held, that the clause in favour of the heirs general did not take effect so long as any issue of any of the devisees capable of taking as tenants in tail survived, and that cross remainders were to be implied in favour of surviving tenants in common.

CASE stated after writ.

The action was brought to recover land situate at Abbott's Kerswell, in the county of Devon, whereof John Hannaford was at the time of his decease seised in fee. The facts of the case, and the material parts of the will of John Hannaford, are fully stated in the judgment of the Court.

Nov. 14. *Philbrick*, for the plaintiffs.

J. Brown, Q.C. (*Atkinson* with him), for the defendants.

The following authorities were cited: *Cook v. Gerrard* (1); Notes to Saunders' Reports, vol i., p. 176; *Livesey v. Harding* (2); *Cooper v. Jones* (3); *Powell v. Howells* (4); Jarman on Devises, vol. ii., pp. 510–526.

Cur. adv. vult.

(1) 1 Wms. Saund. 185.

(2) 1 Russ. & My. 636.

(3) 3 B. & A. 425.

(4) Law Rep. 3 Q. B. 654.

Dec. 11. The judgment of the Court (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.), was delivered by

1871

HANNAFORD.

v.
HANNAFORD.

COCKBURN, C.J. The question in this case arises on the construction of the will of John Hannaford, who died on the 11th of February, 1833.

By his will, dated the 20th of February, 1830, the testator devised an estate, of which he afterwards died seised in fee, to his brother, William Hannaford, for life, and after the decease of the latter, to the four sons of the said W. Hannaford, his nephews, for life, as tenants in common; and after their decease he devised the share or shares of his said nephews, respectively, to their respective eldest sons "now living" for life; and after the decease of such eldest sons he devised the share or shares of each of such eldest sons to the first and other sons of the latter successively in tail male. In default of issue of the eldest sons, he devised the same share or shares to the second, third, and other sons, "now living," of his said nephews, severally and successively, according to their respective seniorities, and to their issue in tail male, "in the same manner and for the same estate and estates" as he had before given to the eldest sons of such nephews. Failing the issue of the sons then living, he devised to all and every the sons of his said nephews, "hereafter to be born, in tail male." After which the will proceeds thus:—"and for default of such issue, I give and devise the same to my own right heirs for ever, it being my will and intention that the said lands shall go and remain in my name and family for ever, or as long as the law will permit such enjoyment of the same."

The testator having died in 1833, William Hannaford, the first devisee for life, took possession and enjoyed the estate till his death in 1838. His four sons, the testator's nephews, referred to in the will, survived their father. William, the eldest, died in 1844, leaving a son and three daughters. The son, William Field Hannaford, died in 1863, never having had any issue. The second son, George Hannaford, died in 1868, having also had no issue. The third son, Peter Hannaford, died some time since, leaving two sons. Of these the eldest, William Pitts Hannaford, went to sea, being then unmarried, and not having been heard of for eleven years, is presumed to be dead. The other, Henry Hanna-

1871

HANNAFORD
v.
HANNAFORD.

ford, is now living. The fourth nephew mentioned in the will, Thomas Pitts Hannaford, died, leaving two sons, the eldest of whom has also since died, leaving a son, Norman Field Hannaford, who, as heir in tail, of course succeeds, as tenant in common, to one fourth of the subject-matter of the devise.

The dispute in the present case relates to the shares of the testator's two nephews William and George, as to whom there has been a failure of male issue. The plaintiffs are the daughters of the eldest nephew, William, and claim under the final clause of the devise in favour of the testator's right heirs in default of male issue of the devisees under the will; contending that on failure of issue of either of such devisees the clause in question takes effect in respect of his share. On the other hand, the defendants, Henry Hannaford, and Norman Field Hannaford, who, as has been shewn, are the heirs of two of the testator's nephews mentioned in the will, contend that the effect of the limitations of the will is to create by implication cross-remainders between the devisees and their respective heirs, and that consequently, they are entitled, as tenants in common, to the shares of the two nephews whose male issue have failed.

At the close of the argument on the case, we were strongly disposed to think that the contention of the defendants was right; but the parties having agreed, on account of the smallness of the property in dispute, to abide by our decision as final, we thought it right to take time for further consideration of the language of the will, and to enable us to look into the authorities bearing on the subject. The result is that our first impression is confirmed, and that we are now satisfied that our judgment should be for the defendants.

The will in question, however complicated and clumsy may be its language, amounts to no more than a devise, after the determination of the life estates, to the issue of the nephews, in tail male, as tenants in common, with a remainder in default of issue to the right heirs of the testator. Now, the law appears to be at the present day perfectly well settled, that, upon such a will, the clause in favour of the heirs general does not take effect so long as any issue of any of the devisees, capable of taking as tenants in tail, survive, and that under such a will cross-remainders must be implied in favour of surviving tenants in common.

After a review of all the cases on the subject, Mr. Jarman (2 Jarman on Wills, 526) draws from them the following conclusions:—First, “that under a devise to several persons in tail, being tenants in common, with a limitation over for want or in default of such issue, cross-remainders are to be implied among the devisees in tail;” secondly, “that this rule applies whether the devise be to two persons or a larger number, and though it be made to them “respectively.”

In the case of *Taaffe v. Conmee* (1), Lord Westbury says: “I arrive at the conclusion that the words ‘for default of such issue male,’ in conformity with their own natural meaning, and also in conformity with the rule that must now be considered to be at length finally arrived at, must mean plainly ‘for default of all such issue male’ as would take under the antecedent limitation.”

In the same case Lord Cranworth says: “I take it that the doctrine is now well established, that whether cross-remainders are to be implied or not is a mere question of construction upon the whole face of the will, and wherever there are limitations in tail, or in tail male, and in default of such issue a gift over, then I take it that the presumption is that that means in default of the issue of all of them.”

Such being the presumption applicable to such a limitation, we not only find nothing in the present will by which such a presumption can be rebutted or controlled, but we see in the express declaration of the testator that his intention is that the lands in question “shall go and remain in his name and family for ever, or as long as the law will permit,” the strongest confirmation of the presumption of law; it being plain that if the absolute property in any part of the land passed to the plaintiffs as heirs, the intention thus declared would be liable to be defeated either by their marrying, or by their alienating the land, or disposing of it by will to some one not of the testator’s name and family.

We are, therefore, of opinion that the contention of the defendants is right, and that our judgment must be in their favour.

Judgment for the defendants.

Attorney for plaintiffs: *Philbrick.*

Attorneys for defendants: *Church, Sons, & Clarke.*

1871

Nov. 22.

FELL v. WHITTAKER.

Landlord and Tenant—Excessive Distress, Right of Action for—Special Property in Goods distrained.

The plaintiff was tenant and the defendant landlord of a house occupied by the former, his wife, and a trustee. Goods therein had been assigned to the trustee on trust for the plaintiff's wife. Rent being in arrear to the amount of 9*l.* only, the defendant, by his bailiff, distrained for 18*l.* and costs, seizing 100*l.* worth of the goods. The rent actually due was tendered to the bailiff, with expenses, but refused, and he remained in possession until an undertaking was given on behalf of the plaintiff for payment of the whole demand, and a part amounting to 2*l.* 7*s.* was paid, whereupon the distress was withdrawn.

The plaintiff having brought an action for an excessive distress, and on the money counts, was nonsuited when the deed of assignment was produced at the trial:—

Held, that, although he was neither the legal nor the equitable owner of the goods distrained, yet he had, from his mere enjoyment of the use of them, a special property which entitled him to maintain the action.

DECLARATION that the plaintiff was tenant to the defendant of a messuage at a certain rent payable by the plaintiff to the defendant, and the defendant wrongfully distrained for certain arrears of the said rent the goods of the plaintiff of much greater value than the amount of the said arrears, and of the charges of the said distress, and of the appraisement and sale thereof, although part of the said goods was of sufficient value to have satisfied the said arrears and charges, and might then have been distrained by the defendant for the same, and the defendant thereby made an excessive and unreasonable distress for the said arrears, contrary to the statute, &c.

Money counts.

Pleas: 1. To the first count, not guilty, by statute 11 Geo. 2, 19, s. 21. 2. To the money counts, never indebted. Issue thereon.

This action was brought in the Salford Hundred Court of Record at Manchester. On the trial the plaintiff gave the following evidence:—"I pay rent to John Henry Whittaker." [He produced receipts for certain amounts.] "I was out of town. Upon my return I found a distress in my house. The man in possession had this warrant." [Put in evidence.] "Distress for 18*l.*

and costs. A quantity of goods had been seized. The value of the goods 100*l.* about. I sent for Mr. Evans" [plaintiff's attorney], "and he made an arrangement with the bailiff; Mr. Evans offered for me to pay a sum of money, viz., 9*l.*, the rent due and expenses. The bailiff refused to take it. Mr. Evans undertook to bring the money, if necessary, on the following day. Mr. Evans gave a personal undertaking to pay the amount. 2*l.* 7*s.* was paid as part of the money. Great annoyance to us." [Cross-examined.] "I have been distrained upon before by request. There was an execution out against me at this time. I have been bankrupt. This is my deed." [Put in evidence.] "An assignment of all property in the house. One of my trustees lives in the house."

The learned judge then nonsuited the plaintiff, reserving leave to move for a new trial.

A rule was obtained to set aside the nonsuit, and for a new trial, on the ground that there was evidence to go to the jury that the property in the first count of the declaration was the property of the plaintiff; secondly, that the plaintiff was entitled to recover on the other count of the declaration.

Herschell shewed cause. (1) The first count of the declaration alleges an excessive distress "of the goods of the plaintiff." But he was neither the legal nor equitable owner (2), nor was he even a bailee of the goods. This action could only be maintained by the owner of the goods. If the plaintiff had any special interest in them that was affected, he should have stated what his interest was. Distraining for more rent than is due gives no right of action: *Tancred v. Leyland*. (3)

[LUSH, J. There the goods were sold; here they were kept until money was paid.]

In *French v. Phillips* (4) a count alleged a tenancy, and that the defendant wrongfully seized and sold goods of the plaintiff to the value of 30*l.*, as distress for 13*l.* claimed as arrears of rent, whereas, in fact, 9*l.* only was due. The plaintiff obtained a verdict,

(1) In the Bail Court before Lush and Hannen, JJ.

(2) It was admitted and taken as a fact that the trusts of the assignment

were for the plaintiff's wife.

(3) 16 Q. B. 669; 20 L. J. (Q.B.) 316.

(4) 1 H. & N. 564; 26 L. J. (Ex.) 82.

1871
FELL
v.
WHITTAKER.

1871

FELL

v.

WHITTAKER.

but the Court of Exchequer Chamber held that the count disclosed no cause of action.

[LUSH, J. It did not appear that the goods, when sold, realized more than the true amount in arrear; so there was no wrong.]

In *Glynn v. Thomas* (1) there was a seizure, but no sale, the defendant having remained in possession until his excessive claim was satisfied, and it was held in the Exchequer Chamber that a count alleging a wrongful distress whereby the plaintiff was compelled to pay a larger sum than was due for rent, disclosed no cause of action, because, as the distress was lawful, the defendant was entitled to tender of the amount really due, and upon his refusal to accept that sum the plaintiff's course was to replevy the goods. The present plaintiff suffered no legal damage from the seizure of the goods. He would enjoy the use of the furniture as well as before. Nor was he injured by the fact of more goods being distrained than were needed to satisfy the demand, for they were the goods of others. The trustees might have paid the rent, and have afterwards recovered the amount from the plaintiff.

[HANNEN, J. *Exall v. Partridge* (2) is an authority for saying that he was under a legal obligation to pay his rent, and that if he failed so to do, he would be liable to strangers whose goods were distrained.]

Had the goods been removed the plaintiff might perhaps have been entitled to sue in respect of his enjoyment of them, which in this instance was not interfered with. And the plaintiff cannot recover on the money counts: *Gulliver v. Cosens*. (3)

[LUSH, J. That was a case of distress damage feasant.]

The same principle applies. Replevin was his proper remedy, and therefore an action for money had and received will not lie: *London v. Hooper*. (4) The payment made by the plaintiff could not be set off in an action against him for another demand: *Knibbs v. Hall*. (5)

Heywood, in support of the rule. Any kind of possession would enable the plaintiff to sue: *Bourne v. Fosbrooke*. (6) He had the

(1) 11 Ex. 870; 25 L. J. (Ex.) 125.

(2) 8 T. R. 308.

(3) 1 C. B. 788.

(4) 1 Cowp. 414.

(5) 1 Esp. 84.

(6) 18 C. B. (N.S.) 515; 34 L. J. (C.P.) 164. *11/20/71 MS. 202*

10/20/71 MS. 370

beneficial enjoyment of the goods. The trustee did not live in the house to hold possession of them. There is no distinction in principle between seizure followed by sale, and seizure only. The detention of the goods by the bailiff, although but for a short time, injured the plaintiff. In *Loring v. Warburton* (1), a landlord claiming more rent than was in arrear, had distrained goods of greater value than his claim, and, notwithstanding that tender was made of the amount really due, detained them until the plaintiff paid the sum demanded; on demurrer to a declaration for excessive distress, it was argued that replevin was the proper remedy, and *Glynn v. Thomas* (2) was cited as an authority to shew that the action would not lie; but Crompton, J., said: "I never could see why an action would not lie. I should be sorry to carry the doctrine of *Glynn v. Thomas* (2) any further;" and Lord Campbell, C.J.: "Here is *damnum cum injuriâ*." Judgment was given for the plaintiff.

[LUSH, J. The counts in *Loring v. Warburton* (1) resemble those in the present case.]

And any distinction which may be found is disposed of by *Johnson v. Upham* (3): see per Wightman, J., delivering the judgment of the Court.

[He was then stopped.]

LUSH, J. I am of opinion that this rule must be made absolute to set aside the nonsuit, and for a new trial. It is material to observe the pleadings in this case, and also to see what was the evidence given before the Court below. [His Lordship read the first count of the declaration, which he pronounced to be perfectly good, and then proceeded to read the evidence set out above.]

The effect of the evidence was, that the property in the house had been assigned to trustees, whether for the wife or for the plaintiff does not appear, but we may assume that it was for the wife. The plaintiff lived with his wife, and had the enjoyment of the property. One of the trustees also lived in the house with them. He, the plaintiff, being tenant of the house, and his rent being somewhat in arrear, a distress was put in for a larger amount than

(1) E. B. & E. 507; 28 L. J. (Q.B.) 31.

(3) 2 E. & E. 250; 28 L. J. (Q.B.)

(2) 11 Ex. 870; 25 L. J. (Ex.) 125.

252. 5 Jan 45. 681

(1) PC 4 Jan 45. 684
(2) SC 2 Jan 45. 370

1871
FELL
v.
WHITTAKER.

1871

FELL

v.

WHITTAKER.

was due, a much greater quantity of goods was seized than was sufficient to satisfy even the sum claimed, and the bailiff refused to accept the amount actually due. The contention on behalf of the defendant is, that there was no evidence to go to the jury on the count for excessive distress.

Now, the argument was founded on the point taken at the trial, and to which the learned judge gave effect, viz., that inasmuch as the plaintiff was not the owner of the goods, but merely had the enjoyment of the property with the consent of his wife and the trustee, he was not in a position to maintain an action for the excessive distress, even although, to regain possession of the goods, he had to pay, or cause to be paid for him, a larger amount than that of the rent due. I think that objection is not tenable, and that he had quite enough special property to enable him to sue. The right of possession which he had with the consent of his wife and her trustee was sufficient; by virtue of that right he would have been entitled to recover possession of the goods if they had been taken away by a stranger, and by that right he is entitled to maintain the present action. I should find no difficulty in directing the jury as to the measure of damages which, I think, would be the sum he was obliged to pay in excess of the rent plus any damage arising from the inconvenience of being deprived of the possession and enjoyment of the goods.

Having regard to the cases cited, I do not think that any authority has been referred to which requires us to decide otherwise than we do now. The case which at first sight appears to lean most in the opposite direction is that of *Glynn v. Thomas*. (1) But I see from the report that the count in the declaration there did not allege an excessive distress. That is pointed out in the judgment as one of the grounds relied on in the argument. The material count in that case commenced by alleging a wrongful distress of the plaintiff's goods "as a distress for alleged arrears of rent, to wit, the sum of 6*l.* 3*s.*, by the defendant, then pretended to be due and in arrear to him from the plaintiff for the . . . tenements and premises, and the defendant wrongfully remained in possession of the said goods under colour of the said distress, until the plaintiff afterwards . . . was compelled to pay, and did then pay, to the

(1) 11 Ex. 870; 25 L. J. (Ex.) 125. *2 Jan 25. 870*

defendant the said pretended arrears of rent," &c. It did not allege that the quantity of goods taken was excessive, nor are there any words there which would make it a good count for excessive distress under the statute; moreover, Coleridge, J., delivering the judgment of the Exchequer Chamber, says: "This is not a case of excessive distress." (1) Compare that with the facts of the present case. Here was an unlawful act alleged and proved, viz., the seizing of a larger quantity of goods than were sufficient to satisfy the amount claimed. Then, under pressure of that act, the plaintiff, in order to recover his goods, paid, or did what was equivalent to paying, the sum demanded. That circumstance distinguishes the two cases, and makes up the cause of action which I think the present plaintiff had.

HANNEN, J. I am of the same opinion. On the face of the declaration this is an ordinary action for excessive distress; and it is clear that the only question raised at the trial was, whether the averment that the goods were the plaintiff's was established, the argument being that he had assigned those goods to a trustee for his wife, and that his enjoyment of them in right of his wife was not enough to give him a right of action. I think that objection was not sustained. I think he was sufficiently interested and had sufficient enjoyment in the goods to give him a right of action against a wrong-doer, and therefore, in respect of that enjoyment he may maintain this action on the assumption that there *has* been an excessive distress. With respect to the point my Brother Lush has so fully gone into, that seems exactly governed by *Loring v. Warburton* (2), and *Johnson v. Upham*. (3)

Attorney for plaintiff: *Williams, for N. Evans, Manchester.*

Attorneys for defendants: *Griffiths & Brownlow, for Brown, Manchester.*

(1) 11 Ex. at p. 877. *2 Jun* (2) E. B. & E. 507; 28 L. J. (Q.B.) 31. *4 Jun Ad. 1834*
25379 (3) 2 E. & E. 250; 28 L. J. (Q.B.) 252. *5 Jun Ad. 1881.*

1871

Nov. 15.

FLEET AND ANOTHER v. MURTON AND ANOTHER.

Evidence, Admissibility of—Usage of Trade to control written Contract—Custom in London Fruit Trade—Making Broker personally liable—Principal and Agent—Broker.

706/101
506482-3-4
486-7-8
CPD 164-2
CPD 375
378-9
506482-200
706483
The defendants, M. & W., fruit brokers in London, being employed by the plaintiffs, merchants in London, to sell for them, gave them the following contract note addressed to the plaintiffs:—"We have this day sold for your account to our principal" so many tons of raisins. (Signed) "M. & W., brokers." The defendants' principal having accepted part of the raisins, and not having accepted the rest, the plaintiffs brought an action on the contract against the defendants, and they sought to make the defendants personally liable by giving evidence that, in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal; and evidence was also given of a similar custom in the London colonial market:—

Held, that the evidence of the custom in the same trade was admissible, as not inconsistent with the written contract, on the authority of *Humsfrey v. Dale* (7 E. & B. 266; E. B. & E. 1004) and that the evidence of a similar custom in the colonial market was admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade.

DECLARATION that on the 30th of October, 1869, plaintiffs and defendants agreed that plaintiffs should sell to defendants, and defendants should buy of plaintiffs, fifty to seventy tons of raisins at a certain price; that defendants, having accepted part, refused to accept the residue of the raisins, according to the contract.

Pleas, *inter alia*, that defendants did not agree as alleged.

Issue joined.

At the trial before Blackburn, J., at the sittings in London after Michaelmas Term, 1870, it appeared that the plaintiffs, Messrs. Fleet & Dobbing, are merchants in London, and the defendants, Messrs. Murton & Webb, are brokers in the fruit trade in London. The defendants were employed, in October, 1869, by the plaintiffs to sell for them certain consignments of raisins, and the defendants handed to the plaintiffs the following contract note:—

"Messrs. Fleet & Dobbing. London, 30th of October, 1869.

"We have this day sold for your account to our principal, to arrive per steamer from Trieste, fifty to seventy tons of good sound

(1) SC 3 Jan 48. 213. 5 Jan 48. 171

Chesne raisins, in cases, at 41s. per cwt., usual market terms. Cash on delivery. F. & D. to draw on M. & W. for 500*l*. (if required) on landing, handing equal value. Customary allowances.

“Murton & Webb, Brokers, 25, Mincing Lane.”

The defendants had purchased on behalf of Demetrius Pappa, and part of the raisins were accepted and paid for by him through the defendants; but, becoming embarrassed, he refused to receive any of the other consignments, upon which, on the 1st of December, 1869, the defendants wrote to the plaintiffs, informing them that Mr. Demetrius Pappa was the buyer under the contract of the 30th of October, 1869, and that he refused to receive any more of the raisins; to which the plaintiffs replied, that the buyer was bound to receive the whole, and that they knew nothing of Pappa, whose name the defendants now furnished, as the plaintiffs' contract was with the defendants themselves.

In order to make the defendants personally liable on the contract, evidence was tendered on behalf of the plaintiffs that, in the London fruit trade, if the brokers do not name their principal in the contract-note itself, the brokers are held personally responsible on the contract. And evidence was also tendered of a similar custom in the London colonial market: viz., that the brokers are held personally responsible, unless they give the name of their principals in writings, within three days after making the contract. Both classes of evidence were received by the learned judge, after objection by the defendants' counsel; and the jury found that the custom was proved.

A verdict passed for the plaintiffs (the amount to be afterwards settled), with leave to move to enter a verdict for the defendants, or a nonsuit, if the Court should be of opinion that evidence of custom was not admissible.

A rule was obtained accordingly to enter a verdict for the defendants or a nonsuit, on the ground that the evidence of custom was not admissible to add to, alter, or vary the contract; or for a new trial, on the ground that evidence of the custom in the colonial market was not admissible.

H. James, Q.C., and *Cohen*, shewed cause. The first point, as to the admissibility of evidence of a custom in the particular trade

1871
FLEET
v.
MURTON.

1871
FLEET
v.
MURTON.

whereby the broker is held personally liable on the contract unless he disclose his principal's name, is concluded by the authority of *Humfrey v. Dale*. (1) This custom is clearly not inconsistent with the written contract within that case. Nor is it any answer to say, that to hold the defendants liable would be to make two principals in the contract; that double liability occurs whenever a broker contracts for an undisclosed principal: *Higgins v. Senior* (2); *Calder v. Dobell*. (3) But the true answer to any difficulty as to the written contract is this: The contract between the plaintiffs and defendants is the contract of employment, not the contract of sale, and the custom is attached to the employment.

[BLACKBURN, J. That is how it has always struck me; but then the declaration should have been on that contract as evidenced by the custom, in a count similar to a count on a *del credere* commission.]

The Court has full power to amend. Secondly, the evidence as to the custom in the colonial trade was admissible as evidence in an analogous trade in the same place. In *Noble v. Kennoway* (4), the contract relating to Labrador, evidence was admitted of the custom in Newfoundland as to similar voyages in the fishing trade. *Falkner v. Earle* (5) is a similar decision as to different or new ports in the same country.

Murphy, in support of the rule. The custom here contradicts the contract, for the name must be given on the face of the contract: otherwise the broker is to be taken as principal; which distinguishes the case from *Humfrey v. Dale*. (6) *Fairlie v. Fenton* (7) is directly in point for the defendants. Secondly, no foundation was shewn for the admission of the evidence of the custom in the colonial trade; there was no evidence that the two trades were in any way analogous. In *Noble v. Kennoway* (4) the trades of Labrador and Newfoundland were identical, both being the fishing trade. To hold that this evidence was admissible will be to go further than any case has yet gone.

(1) 7 E. & B. 266; 26 L. J. (Q.B.)
137; S. C. in Ex. Ch. E. B. & E. 1004;
27 L. J. (Q.B.) 390.

(2) 8 M. & W. 834.

(3) Law Rep. 6 C. P. 486.

(4) 2 Dougl. 510.

(5) 3 B. & S. 360; 32 L. J. (Q.B.) 124.

(6) E. B. & E. 1004; 27 L. J. (Q.B.)
390. *5 June 48 171*

(7) Law Rep. 5 Ex. 169.

(1) SC 3 June 48, 213-5 June 48 171
(3) SC 9 June 48, 847

COCKBURN, C.J. I am of opinion that this rule must be discharged. I quite agree in the propriety and soundness of the decision given by the Court of Exchequer in the recent case of *Fairlie v. Fenton* (1), where the plaintiff contracted, as a broker, for a principal named, for in that case the principal was named; and I am of opinion that the same principle would apply where the principal is not named, so long as it appears on the face of the contract that the broker is contracting, as broker, for a principal, and not for himself as principal; and in that case, also, the broker would not be liable on the contract if the principal failed to fulfil his contract. But I think, nevertheless, that the evidence of the custom was admissible, and that, after that evidence had been given, the brokers were properly held liable on the contract. For, although where a party contracts as agent there would not, independently of some further bargain, be any liability on him as principal, yet, if a man, though professing on the face of the contract to contract as agent for another, and to bind his principal only and not himself, chooses to qualify that contract by saying that he will make himself liable, though he is contracting for another, and giving to another rights under the contract, he himself will incur the same liability as his principal. Now, although, where a party professes to contract as broker, it might *primâ facie* be taken that he contracts without the intention of incurring liability on his own part, yet, if by the custom of the particular trade there is that qualification of the contract (which, if written into the contract in *extenso*, would undoubtedly bind him), that qualification may, I think, be imported into the contract by evidence of the custom. In the case of *Fairlie v. Fenton* (1) there was no qualifying circumstance like the custom in the present case. The defendants here undoubtedly call themselves "brokers," acting for their principal. But if the custom attaches, the non-liability, which would under ordinary circumstances *primâ facie* exist in a contract made by a person purporting to contract as broker, ceases, and the contract assumes a different form and character, and carries with it different legal consequences, by reason of the custom of the trade, evidence of which, according to all principles, is admissible to qualify the terms of a contract where not inconsistent with it.

(1) Law Rep. 5 Ex. 169.

1871

FLEET
v.
MURTON.

1871

 FLEET
 v.
 MURTON.

I am of opinion, therefore, that the evidence of custom in the particular trade, was properly received by my Brother Blackburn to fix the liability of the defendants.

I own I entertain somewhat more doubt as to the admissibility of evidence of a similar custom in other trades than the particular trade which was the subject-matter of this contract. This case seems to me to go further than the case of *Noble v. Kennoway* (1), which related to the admissibility of evidence of custom in the trade of Newfoundland as applicable to the custom of the trade in Labrador. Labrador had been recently annexed to Newfoundland (2), and the trade in each was of the same description, it being a trade that related to fishing. By the terms of the contract (a policy of insurance) the ship was to be at liberty to call at Newfoundland, and it might be fairly inferred by persons entering into a contract with reference to the trade of Labrador, that what was the custom of the trade of Newfoundland would extend to the trade of Labrador. But this case goes further. At the same time it is impossible to shut one's eyes to the fact that the moral effect of the evidence would operate on a reasonable mind with very considerable force. If there exists a custom to the effect that the agent makes himself liable under given circumstances, in a large and extensive trade like the colonial trade, it makes it more probable that in the fruit trade in the Mediterranean or elsewhere a similar custom would obtain. I am not quite so clear on the point, but still I do not think that the argument addressed to us goes so far as to shew that this evidence was not admissible. There is no doubt that it would be useful in elucidating the truth; and, therefore, on general principles, I think the evidence was admissible, and I concur with the judgment which my learned Brothers are about to pronounce.

(1) 2 Dougl. 510.

(2) The disputed territories of Newfoundland and Labrador were ceded by the French to the English by the treaty of Utrecht in 1713, and this cession was finally affirmed by the treaty of Paris in 1763; and in October of that year Labrador was annexed to the government of Newfoundland by

royal proclamation. In 1774, by 14 Geo. 3, c. 83, Labrador was made part of the then province of Quebec, and afterwards in 1791, on the division of that province into Upper and Lower Canada, it became part of the lower province. Finally, in 1809, by 49 Geo. 3, c. 27, s. 14, Labrador was re-annexed to Newfoundland.

BLACKBURN, J. I am of the same opinion. Upon the first point I quite agree with what my Lord has said. The recent decision of the Court of Exchequer in *Fairlie v. Fenton* (1) was perfectly right. I take it that there is no doubt at all, in principle, that a broker, as such, merely dealing as broker and not as purchaser of the article, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either buyer or seller, and that consequently where the contract, as in the present case, in terms says, "Sold to A. B.," or "Sold to my principals," and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods; he is simply the broker making the contract. Then I take it that there is no doubt at all, that the rule of law laid down in the case of *Higgins v. Senior* (2), and the other cases there cited, such as *Jones v. Littledale* (3), is perfectly correct, namely, that where the agent of the purchaser, though really making the contract between two principals, chooses to make the contract in writing in a form in which he declares himself to be the contracting party, he thereby says, "I am to be liable." And though he has done this, yet, his principal also is liable: because the agent who has made the contract does bind his principal, though he has chosen to bind himself also; and it is no answer (as was held in the recent case in the Common Pleas of *Caldar v. Dobell* (4), which was affirmed in the Exchequer Chamber) to say on the part of the principal, "The contract was made by my agent, and my agent is responsible." That the agent is liable is no answer, and no reason why the principal should not be responsible. Consequently, I agree that in the present case, if it were not for the evidence of custom, the defendants who contract for a principal "sold to our principal," and sign as brokers, would not have been liable at all upon this contract. But then there came the custom, and the evidence of custom was to this effect: that in this trade the brokers deal on these terms. The custom is that if the broker does not disclose his principal's name on the contract he is personally liable. The custom did not go to the extent, and there is not the slightest ground for saying that the custom went to shew, that the principal was not liable

1871

 FLEET
v.
MURTON.

(1) Law Rep. 5 Ex. 169,

(3) 6 A. & E. 486.

(2) 8 M. & W. 834.

(4) Law Rep. 6 C. P. 466.

1871

 FLEET
 v.
 MURTON.

also, or that the principal was discharged. It was simply this, that if the broker did not name the principal in his contract he incurred personal liability.

Now upon the point of whether the evidence was admissible, several questions arise upon these pleadings. If the matter were *res integra*, I should have felt great difficulty indeed, as some of the Judges in the Exchequer Chamber did in *Humfrey v. Dale* (1), in making out how the custom could make the broker, who is, in fact, not contracting as purchaser, liable in the terms of the count in that case which charged the defendant as purchaser. But *Humfrey v. Dale* (1) is binding upon us as to this point. My own impression is, that the right way to declare, if this case should ever go to the House of Lords, would be by a count analogous to a count on a *del credere* commission. Parke, B., in *Couturier v. Hastie* (2), in an elaborate judgment, gives the effect of such a contract. The contract-note was like the present. It was in the corn trade. There was a contract-note in which the defendants, as brokers, sold to their principal, and delivered a contract-note to the other party. The evidence of custom was that in all such cases the broker receives a *del credere* commission, and has the liability of a *del credere* agent. The objection taken to the liability of the defendants was, that there was no note in writing, and that selling on a *del credere* commission was a guaranteeing within the Statute of Frauds. But, says Lord Wensleydale, in delivering a considered judgment, it was nothing of the sort, "the defendants being the agents to negotiate the sale, the commission is paid in respect of that employment. A higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by the vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given." He says that it is neither a guaranteeing nor a contract of sale, and that

(1) E. B. & E. 1004; 27 L. J. (Q.B.) 390. *Spencer v. 191* (2) 8 Ex. 40, 56; 22 L. J. (Ex.) 97, 103.

consequently the Statute of Frauds is out of the question. It seems to me, therefore, as Mr. Cohen said, that this custom must be taken as merely regulating the terms of the employment. I cannot see that it differs from the case of a board stuck up at a broker's office, saying: "Nota bene; we are brokers engaged in the fruit trade, and we conduct business, when employed, on the following terms: If we receive an extra commission of one per cent. we have all the liability of del credere agents; but, if we do not, we are not liable to tell you the names of our customer in the bought note; but we tell you,—as it is a matter of considerable importance to us, that we should not let you know who our principals are,—that, if we conceal the names of our principals, and you choose to deal with us on those terms, we will take all the liability of del credere agents, though we don't receive the commission." Certainly, if such a notice were stuck up over the doors of the fruit brokers, and then people came in and dealt with them on those terms, I cannot see that to charge them that they dealt, as brokers, upon the terms which they published, would be in the slightest degree inconsistent with, or contradictory to, or qualifying, or in any way interfering with, the contract expressed when they delivered the contract-note. But inasmuch as the Exchequer Chamber, on precisely similar counts, in *Humfrey v. Dale* (1), thought the evidence was admissible, on the declaration as it stands in this case, it would be unwise to amend now; but if the case ever goes to the House of Lords it may be worth while to consider, whether a count setting out such a contract will not obviate all objection.

Now, passing from that point, we have to consider whether the evidence of custom in the colonial trade was admissible; and I am bound to say that I clearly think it was. The objection taken was that there was no evidence to make the defendants, the brokers, responsible at all. Then the plaintiffs' counsel said, "I will prove by evidence of persons connected with the fruit trade, that the broker, where he does not disclose the principal's name, makes himself personally liable." The plaintiffs accordingly offered evidence to prove such a custom, and, to strengthen the evidence, shewed that in the colonial trade brokers did incur a personal

1871

 FLEET
v.
MURTON.

(1) E. B. & E. 1004; 27 L. J. (Q.B.) 390.

5 Jan 1871

1871

FLEET
v.
MURTON,

liability if they did not disclose their principal's name. What was proved was this: that the trades were very closely allied to each other. All brokers are very closely connected with each other; they all deal with merchants, and with much the same merchants, in the general way of business; and they buy and sell sometimes fruit, sometimes wool, and sometimes other things. And it struck me, where the question was, does a broker, in the fruit trade, if he does not disclose his principal's name, incur a personal liability in consequence, that it would be proper evidence for a jury to consider and weigh, that such a custom existed in other trades, and that in those other trades the broker did incur a personal liability. I think it cannot be denied that any sensible person would say, that the existence of such a liability in the colonial trade, as was established in *Humfrey v. Dale* (1), would be very cogent evidence as to whether there would be such a liability in the fruit trade. That is the reason, because I thought it would have this strong bearing on the case, that I left it to the jury. I quite agree that the case of *Noble v. Kennoway* (2) bears but slightly upon the point. It is, to some slight degree, analogous; but very slightly indeed, and there is no other authority cited at all; therefore we must go on the principle of common sense. This point was not reserved; but if the defendants go to error on the other main point, they ought to have leave to take this point also.

MELLOR, J. I am of the same opinion. I do not propose to add anything as to the first two points, because I think they have been conclusively disposed of by my Lord and my Brother Blackburn. But with reference to the last point as to the admissibility of the evidence of the custom in the colonial trade, which is a new point so far as I am aware, I think this case goes further than any case has actually gone; yet I cannot help thinking that the evidence was relevant to this case and admissible, on the ground that, shewing, as it did, what was the custom in other trades, though not so analogous, no doubt, to the trade in question, as was the trade in *Noble v. Kennoway* (2), it tended to shew the probability, that in the fruit trade as well as in the colonial trade

(1) E. B. & E. 1004; 27 L. J. (Q.B.) 390.

(2) 2 Dougl. 510.

5 Jan 20 1871

the broker did under given circumstances undertake a similar responsibility.

1871

FLEET
v.
MURTON.

Rule discharged.

Attorneys for plaintiffs: *Lowther, Mullens, & Clair.*

Attorneys for defendants: *Stibbard & Beck.*

CORE, APPELLANT; JAMES, RESPONDENT.

Nov. 15.

Bread, adulteration of—Conviction under 6 & 7 Wm. 4, c. 37, for using a certain mixture in the making of Bread—Guilty Knowledge.

The appellant, a baker, was convicted under s. 8 of 6 & 7 Wm. 4, c. 37, for using a certain mixture or ingredient, to wit, alum, in making bread for sale. At the hearing it was proved that he sold a loaf adulterated with alum; but no evidence was adduced tending to prove knowledge on the part of the appellant or of the servant who made the bread that alum was used in the loaf:—

Held, that, to constitute the offence under the above section, there must be a guilty knowledge, and that the conviction was wrong.

CASE stated under 20 & 21 Vict. c. 43, by the Justices for the borough of Bolton.

The appellant was convicted, under 6 & 7 Wm. 4, c. 37, s. 8 (1), for that he did, on the 16th of December, 1870, in a certain shop in, &c., use a certain mixture or ingredient, to wit, alum, in the making of certain bread for sale in such shop, such mixture or ingredient being other than such as are mentioned and enumerated in s. 2 of the above statute.

(1) 6 & 7 Wm. 4, c. 37, s. 8:—
“That no baker or other person or persons who shall make bread for sale beyond the limits aforesaid, nor any journeyman or other servant of any such baker or other person, shall, at any time or times in the making of bread for sale beyond such limits, use any mixture or ingredient whatsoever in the making of such bread other than and except as hereinbefore mentioned, on any account or under any colour or pretence whatsoever, upon pain that every such person, whether master or journeyman, servant, or other person who shall offend in the premises, and shall be

convicted,” shall be liable to a penalty; “and it shall be lawful for the magistrate or magistrates, justice or justices before whom any such offender or offenders shall be convicted, to cause the offender’s name, place of abode, and offence, to be published in some newspaper, which shall be printed or published in or near the city, county, borough, or place where the offence shall have been committed, and to defray the expense of publishing the same out of the money to be forfeited as last mentioned, in case any shall be so forfeited, paid, or recovered.”

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1871

CORE
v.
JAMES.

The respondent purchased a loaf of bread in the shop of the appellant, who admitted that the loaf was of his own making; on analysis it was found that the loaf contained 40·97 grains of alum.

The appellant called his baker as a witness, who deposed that the bread sold on the 16th of December was made by him from a sack of flour in appellant's shop; that he, the baker, did not put any alum in the flour, and that none could have got in without his knowledge; that he was the only person who made the bread; that he made it purely from the flour; and that no other person worked on the premises but himself.

The appellant's attorney contended that, beyond the simple finding of the alum in the loaf of bread in question, there was no evidence whatever even of a *prima facie* character that the appellant had used the mixture, to wit, alum; and that the appellant was ready to give the name of the miller from whom he had, prior to the 16th of December, the day of the alleged sale by him of the loaf of bread, purchased, wholesale, ten sacks of flour, and to produce a portion or whole of what he had still on hand, so that the party really culpable might be reached under s. 9.

The questions for the opinion of the Court were—

1. Whether, supposing the alum to have been mixed in the flour previous to the purchase by the appellant, he was entitled to his acquittal on the ground that he did not mix the alum in the flour.

2. Whether the fact of the loaf of bread being upon the appellant's premises, admitted to be of his making, and containing alum, was sufficient to ground a conviction for using a certain mixture or ingredient, to wit, alum, in the making of such bread.

The Court having remitted the case to the justices for further information, the following statement was added :—

At the hearing of the case in question no evidence was adduced tending to prove the knowledge of the appellant that alum was used in the bread in question, and we did not find that the appellant knew that alum was used in such bread.

Baylis, for the appellant. The conviction is bad. There is no evidence that the appellant knowingly used the mixture. The words of s. 8 are, "shall use any mixture;" use means knowingly use.

[LUSH, J. According to s. 13 a master may be punished if the servant wilfully put alum into bread.]

1871

 CORE
v.
JAMES.

The master is liable to be punished for the act of his servant, but it is for the wilful act only; but he is not liable if alum is found to be in bread of his making without any default of himself or his servant. The offence is disproved by the facts found.

Edwards, for the respondent. If a baker uses alum in making bread, it is immaterial whether he has a guilty knowledge; and this view is confirmed by the fact that the word "knowingly" is not used in s. 8, but is found in s. 9. Where a mens rea is necessary to constitute the offence, the statute provides, in express terms, that the wrongful act shall be committed knowingly. The statute is passed for the protection of the public, and the baker is bound to take care that the bread is made free from adulteration.

Baylis was not heard in reply.

LUSH, J. I am of opinion this conviction must be quashed.

Two questions are submitted to us, and the answers to them depend on the construction of s. 8. The words are: "That no baker who shall make bread for sale, nor any journeyman or other servant of such baker, shall, at any time or times, in the making of such bread for sale, use any mixture or ingredient whatsoever in the making of such bread, other than and except as hereinbefore mentioned." And s. 9 imposes a penalty "on any person who shall put into any corn, meal, or flour, any sort of corn or grain or any ingredient whatsoever, mixed with the meal or flour so sold."

Now, I think, taking those two sections together, it is clear that the user spoken of in s. 8 must be a guilty user, a user by a baker who knows that he is using such an ingredient as is forbidden by the Act. I think that if a journeyman knowingly uses one of these ingredients his master, although innocent, will be liable to be convicted for the guilty act of the journeyman; and s. 13 prevents any hardship, since it gives the master the right to recover against the servant the penalty which the former is adjudged to pay. But where both the master and the servant are innocent, I cannot think that either of them can be said to have used, in the making of bread, any mixture or ingredient, within s. 8.

Upon the facts the justices have found that the master had no

1871

CORE
v.
JAMES.

guilty knowledge, and the form of the questions leads irresistibly to the conclusion that they believed the journeyman to be equally innocent, because the first question assumes the alum had been mixed in the flour before the appellant purchased it. It follows that, as neither of them had any guilty knowledge, neither of them is brought within the provisions of s. 8.

HANNEN, J. I think the meaning of s. 8 is, that if the baker knowingly uses any forbidden ingredient he shall be liable to a penalty; and if his servant knowingly uses it, the baker is responsible. It was intended that the master should be answerable for the guilty act, whether of himself or of his servant; but where there is an utter absence of knowledge, both on the part of the master and of the servant, it cannot be said that either of them uses the ingredient, for he does not know that it exists. The liability of the master under this Act for the acts of his servant is extended by s. 12. By that section, if any improper ingredient is found on the premises of a baker in order to be used for adulteration, though no guilty intent exists in the master's mind, yet he is responsible and liable to be punished. Section 13 is intended for the master's protection; if he has been convicted of any offence against the Act by reason of the guilty knowledge of his servant, he may take proceedings against the servant. The provisions of the Act cast great responsibility on a master baker, but I cannot think it to have been the intention of the legislature that he should be liable to a penalty for anything that occurs by accident. If this were so, the master might be punished when some forbidden ingredient had fallen into the flour without the knowledge of either himself or his servant; and I am the more inclined to think that the legislature had not this intention, because the name of the master who has been convicted under the Act is to be made public in order that persons may be warned against dealing at a shop where something wrong has been done, either by the servant or his employer.

Judgment for the appellant.

Attorneys for appellant: *Chester & Urquhart.*

Attorney for respondent: *C. E. Abbott.*

[IN THE EXCHEQUER CHAMBER.]

1871

Nov. 27.

SMITH v. MYERS AND ANOTHER.

Contract of Sale of Cargo "expected to arrive" by a particular Ship.

The defendants' correspondents at Valparaiso bought on their account of S. & Co. 600 tons of nitrate of soda, and on the 16th of July, 1868, they chartered the bark *Precursor* to bring it to England, and they, on the same day, wrote to the defendants of this. On the receipt of the advice, the defendants, on the 8th of September, made a contract, through brokers, with the plaintiff: "We have this day sold to you about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12s. 9d. per cwt. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." In the mean time, on the 13th of August, an earthquake had destroyed the greater part of the nitrate of soda while lying at the port of lading; and, it having been determined by arbitration, pursuant to the contract, that S. & Co. were not bound to supply other soda, on the 2nd of September the Valparaiso house had cancelled the charter of the *Precursor*. Afterwards, on learning from the defendants that they had sold the nitrate of soda to arrive, but not on what terms, they purchased other 600 tons of nitrate of soda at above the defendants' limit, and obtained a transfer of a charter of the same bark *Precursor*, and shipped the nitrate about the 23rd of December to the defendants, to enable them to execute their contract, if obliged to do so, or to sell at a profit, if free. The *Precursor* arrived in England on the 8th of May, 1869, and the plaintiff demanded the cargo under the contract of the 8th of September:—

Held, affirming the judgment of the Court of Queen Bench, that the plaintiff was not entitled to the cargo.

APPEAL from the decision of the Court of Queen's Bench, making absolute a rule to enter a verdict for the defendants.

This was an action for not delivering a cargo of 600 tons of nitrate of soda pursuant to a contract of sale of the 8th of September, 1868.

The facts of the case are fully set out in the report in the court below (1), and sufficiently appear from the headnote.

A verdict passed for the plaintiff at the trial, with leave to move to enter a verdict for the defendants; and the Court of Queen's Bench made the rule absolute, on the ground that the contract, though not for a specific cargo, was a contract for a specific adventure, which was put an end to by the destruction of the soda by the earthquake.

(1) Law Rep. 5 Q. B. 429.

1871

SMITH
v.
MYERS.

R. G. Williams (Quain, Q.C., with him), for the plaintiff, urged the same arguments as in the court below. He cited Johnson v. Macdonald. (1)

Milward, Q.C. (Baylis with him), for the defendants, was not heard.

KELLY, C.B. The question in this case is, whether the contract before us of the 8th of September, 1868, relates to a specific quantity of nitrate of soda which was purchased, and which is, in fact, referred to in the letter of the 16th of July, or whether it relates to a certain quantity of nitrate which might at a subsequent time have been purchased, and which might ultimately have been conveyed to England in the *Precursor*. I am clearly of opinion that it relates to the quantity which is referred to in the letter of the 16th of July, the quantity which had been actually purchased, and which was intended to be conveyed, and therefore was, within the very terms of this contract of the 8th of September, by the defendants "expected to arrive" by the *Precursor*. There can be no doubt, when we look at the facts of the case, that a specific quantity of 600 tons of nitrate had been purchased by the agents of the defendants at Valparaiso, and that the letter of the 16th of July informed the defendants of that purchase, and that the ship *Precursor* had been chartered in order to convey that specific quantity so purchased to this country; that when the contract was entered into by the defendants with the plaintiff they undoubtedly meant nothing else than the specific quantity referred to in the letter of the 16th of July, and which they believed was at that time either actually shipped on board the *Precursor*, or was then lying ready to be shipped on board. The question is, whether the mere accident that that letter was not communicated by the defendants to the plaintiff alters the meaning and the legal effect of the contract which was entered into, and converts the specific quantity, which no doubt the defendants intended, and which is actually the property described by the contract, into any quantity which may or may not have been at the time purchased, and which should afterwards have been sent to this country by the *Precursor*. I think it does not. We have only to look at the terms of the con-

1871

SMITH
v.
MYERS.

tract itself to see it clearly refers to some specific quantity to which the description in the contract directly applies. The words of the contract are:—"We have this day sold to you, on account of Messrs. W. J. Myers, about 600 tons of nitrate of soda." Now if it had stopped there, it might have meant any 600 tons which might at that time have been, or which might thereafter be purchased. But they go on to give this precise description to the 600 tons the subject of the contract. "About 600 tons, being the entire parcel of nitrate of soda expected to arrive at the port of call per *Precursor*." Now, does not this as plainly as words can speak say to the plaintiff, "There is a certain quantity about 600 tons, of nitrate of soda, expected to arrive at the port of call, and it is one entire parcel?" I think that without any communication of the letter of the 16th of July to the plaintiff, the plaintiff was apprised by the terms of this contract that it related to some one entire parcel of nitrate of soda, which the defendants expected to arrive by the *Precursor*. There was, therefore, an entire quantity, and a specific quantity which the defendants expected to arrive, and that quantity, it is clear, was described in the contract; and the words in the subsequent condition seem really to place the case beyond all doubt: "Should any circumstance or accident prevent the shipment of the nitrate, this contract to be void." Has not this provision in the contract attached? It is very true that an accident had occurred before the date of this contract, although it was unknown to the parties; but whether it was an accident which had already occurred, or which might occur, it was an accident. I say nothing at this moment of the award. There was an accident from an earthquake having destroyed the greater quantity of the nitrate, which de facto prevented the shipment on board the *Precursor*, and therefore, under the precise terms of this part of the contract, the condition on which the contract was to be void had attached.

Let us suppose that this nitrate of soda had not been destroyed by the earthquake, but had been conveyed to a wharf and was about to be shipped on board the *Precursor*, and an embargo had been laid upon it, which prevented the shipment, and the *Precursor* had consequently sailed without it, but the *Precursor* at the time had on board another quantity of 600 tons of other nitrate of

1871

SMITH
v.
MYERS.

soda consigned by this house at Valparaiso to the defendants in Liverpool, could the plaintiff have claimed that quantity? There would have been 600 tons of nitrate of soda which had arrived by the *Precursor*, just as the soda in question did ultimately arrive by the *Precursor*, could he have claimed it, and why not? He clearly could not; that might have been contracted to be sold by the defendants to other persons, and he would have no right to it under the contract in question. Why could he not have claimed it? Because the answer of the defendants would have been this: "We undertook to sell to you a quantity of nitrate of soda expected to arrive by the *Precursor*, and we referred to a particular quantity which had been purchased, and that quantity which we thus referred to has been prevented by an accident, an embargo laid upon it, being shipped on board this vessel, therefore we cannot perform the contract, because, by virtue of the condition, the contract is void."

It appears to me, therefore, whether we look at the language of the earlier part of the contract where they specify the quantity in question by description, which is an entire parcel of nitrate of soda expected to arrive, or whether we look at the subsequent provision, that if any accident should prevent the shipment of the nitrate, the contract is to be void, the contract is intended to refer to a specific quantity which the defendants had notice of in the letter of the 16th of July. That specific quantity was prevented from being shipped in consequence of an accident, whether we take the accident to be the earthquake, or whether we look at the meaning of the award, which had the effect of preventing the shipment of any quantity of nitrate under this contract on board the *Precursor*: so that the contract under the provision which is contained in it became void, and, consequently, the plaintiff is unable to enforce it.

Upon these grounds, I think that the judgment of the Court of Queen's Bench was right, and must be affirmed.

WILLES, J. I entirely agree, in the main, with my Lord Chief Baron as to the judgment of the Court; but I must reserve my opinion as to the supposed case of 600 tons being put on board and being claimed by several people. I cannot, as at present

advised, agree with what he has said on that supposed case of several people claiming 600 tons put on board under separate contracts; but it is unnecessary to go that length in the present case. My notion is, that, as the sellers stipulated that, if the intended shipment of the whole cargo was prevented by any circumstance or accident, the contract was to be void, the earthquake and award (though that was *res inter alios acta*), were a circumstance which the parties must be taken to have had in contemplation, and therefore, that that did amount to a circumstance or an accident which avoided the contract.

1871

SMITH
v.
MYERS.

CHANNELL, B. I am of the same opinion. I think the judgment of the Court below must be affirmed.

KEATING, J. I am of the same opinion.

PIGOTT, B. I agree with the reasons given.

CLEASBY, B. I have nothing further to add, than that the cargo which arrived in May was not the cargo which in September was expected to arrive.

Judgment affirmed.

Attorneys for plaintiffs: *Jones, Blackland, & Son, for Abbot & Leonard, Bristol.*

Attorneys for defendants: *Walker & Sons, for Ellis & Field, Liverpool.*

1871

Nov. 27.

[IN THE EXCHEQUER CHAMBER.]

COATES AND ANOTHER v. COLLINS.

Covenant for Title—Assignment of Lease for Lives—Covenant that Lease is subsisting for the Three Lives.

By deed of July, 1853, after reciting a lease of the 10th of March, 1847, from E. F. to defendant, for the lives of A., B., and C., and the survivors or survivor of them, defendant conveyed the premises to plaintiffs, to hold for the lives of A., B., and C., and the survivors or survivor of them, and covenanted "that the said lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law, for the lives of the said A., B., and C., and the survivors or survivor of them, and is not forfeited, surrendered, or become void or voidable." B. having died before July, 1853, plaintiffs sued defendant for a breach of the covenant:—

Held, affirming the judgment of the Court of Queen's Bench, that the mention of the three lives was mere matter of description, and that the covenant only amounted to a covenant that the lease was still subsisting, and not to an implied covenant that the three lives were still in existence.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendant on demurrer to a plea.

The declaration was on an assignment of the 2nd of July, 1853, by the defendant to M. G. W. Coates (whose estate had since vested in the plaintiffs) of a lease of the 10th of March, 1847, for three lives, with a covenant by the defendant that the said lease was a good, valid, and subsisting lease for the said three lives. Breach: that one of the lives had dropped before the assignment.

The plea set out the deed of assignment of the 2nd of July, 1853, at length. It was an indenture between the defendant of the one part, and M. G. W. Coates of the other part, and recited (*inter alia*) the lease of the 10th of March, 1847, whereby Lady Emily Foley demised to R. H. Lenthal and G. C. Carden, their heirs and assigns, for the natural lives of W. Walker, W. Jones, and R. Heath, and the natural lives and life of the survivors or survivor of them, at the yearly rent of 5*l.* and 5*l.* 5*s.*, for a heriot on the decease of each of the said lives, and subject to the covenants, provisoes, and agreements therein contained; and an assignment of the lease by Lenthal (Carden having died) to the defendant; and witnessed that the defendant, in consideration of 1225*l.* granted and conveyed to M. G. W. Coates, his heirs, executors, administrators, and assigns, a certain messuage and premises, to hold "for

1871

COATES
v.
COLLINS.

and during the lives and life of the said W. Walker, W. Jones, and R. Heath, and the lives and life of the survivors and survivor of them, subject to the rents, heriots, covenants, provisoes, and agreements in the said recited lease of the 10th of March, 1847." There was (inter alia) a covenant by the defendant "that the said recited indenture of lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law for the lives of the said W. Walker, W. Jones, and R. Heath, and the survivors and survivor of them, and is not forfeited, surrendered, or become void or voidable;" and that the said yearly rents and all covenants, &c., had been paid and observed. There was also a covenant for quiet enjoyment "during the lives of the said W. Walker, W. Jones, and R. Heath, and the survivors or survivor of them," and a covenant, for further assurance, "from time to time, and at all times hereafter, upon reasonable request by Coates, unto him for the lives of the said W. Walker, W. Jones, and R. Heath, and the survivors or survivor of them."

The plea concluded, and though true it is that the said W. Jones did die before the making of the deed of the 2nd of July, 1853, yet the other lives were then living; and, unless the covenants were broken by the fact of Jones having so died, none of the covenants were broken as alleged.

Demurrer and joinder.

In the Court of Queen's Bench (1) Blackburn and Mellor, JJ., were of opinion that the covenant relied on in the declaration only amounted to a covenant that the lease was still subsisting, and not to a covenant that the three lives were still in existence; Lush, J., being of a contrary opinion.

J. Brown, Q.C. (*A. T. Laurence* with him), for the plaintiffs. Taking the whole deed together, it is plain that it purports to assign the whole of the original term, and not merely so much as might remain. The habendum itself amounts to this. If one life might have dropped, so might two; but it is impossible to say that the habendum would have then been in this form. It is clear, as Blackburn, J., says, that the parties thought all the lives were still in existence; and if so, it is equally plain that the covenant must mean what Lush, J., says it does.

(1) Law Rep. 6 Q. B. 469.

1871

COATES
v.
COLLINS.

[KEATING, J. The covenant for further assurance "at all times" is in the same terms as to the three lives; but how could the assignor be able to assure for the three lives after one had fallen?]

The covenant must be taken reddendo singula singulis.

[WILLES, J. Are there any precedents in the books, in conveyances of leases for lives, of a covenant that the lives are still in existence? Is it not a matter of fact for inquiry and requisition rather than for a covenant in the deed? I have been able to find only one instance, in 2 Roll. Abr. p. 249 (1), of anything like such a covenant.]

There are certainly no precedents to be found in the books. But why may not the assignee look to a covenant for security, instead of making inquiry? For that no inquiry was made is clear from the fact that the life had dropped. The judgment of Lush, J., in the court below, as well as of Lord Ellenborough, C.J., in *Barton v. Fitzgerald* (2), shew that effect ought to be given to what the parties must have intended. The plaintiffs must be taken to have contracted to purchase a lease for three lives, and the defendant to sell that; but one of the lives, it is admitted, had dropped. Would the plaintiffs have so contracted unless they had the security of the defendant's covenant?

(1) 2 Roll. Abr. p. 249, Parols (D), pl. 2: The placitum is thus translated in 16 Viner, p. 205, Parols (D), pl. 2: If a lease for years be made to A., determinable upon the lives of B., C., and D., and after B. dies, and then A. assigns to E., and after E. by indenture reciting the said lease, and the death of B., and the assignment to him by this indenture, now assigns the term to F., and covenants with him that he himself is lawfully possessed of all the premises, of a good and sufficient estate for the residue of the said term then to come, "if the said C. and D., or either of them, shall happen so long to live, and they, the said C. and D., are yet in full life;" though the words are not "and that the said C. and D. are yet in full life," yet it is implied by the words, and it ought to be a several covenant, or

otherwise this last part will be void and to no effect. Trin. T. 11 Car. B. R. between *Baskett* and *Scott*, adjudged upon a demurrer, in which the breach was assigned, because C. was dead at the time of the assignment made to him, and the word "that" was added to the other words in the declaration, and the defendant demanded oyer of the indenture, which was entered in hæc verba, in which the said word "that" was not; yet, because it was no more than the law implied, it was adjudged good. Intratur P. 11 Car. 1, B. R. Rot. 221. [This appears to be the case referred to as "P. 11 Car. 1, 221," in Lord Nottingham's MS. notes of the argument in *Holles v. Carr* (3 Swanst. at p. 649). See also 2 Freem. at p. 4.]

(2) 15 East, at p. 541.

Manisty, Q.C. (Lord with him), for the defendant. The words throughout are mere words of description. Had the plaintiffs intended to rely on a covenant of the defendant, they would have taken care that it should be express that the three lives were in being in so many words, and would not have left it to mere implication. All the defendant assured by his deed was a valid assignment of the original estate, which remains the same, and is aptly described as a subsisting lease for the three lives and the life of the survivor as long as one of the lives exists.

J. Brown, Q.C., in reply.

KELLY, C.B. But for the opinion expressed by my Brother Lush,—and every opinion of that learned judge is entitled to the utmost respect,—I should have had no hesitation in saying that this was a case entirely free from doubt. The covenant in question is an express covenant that the lease is a good, valid, and subsisting lease in the law for the three lives named; and no doubt it was a good and subsisting lease, though one of the lives had dropped. That this is the meaning is plain to my mind, and the introduction of the lives is simply matter of description; and this is made still plainer by the words which follow: “and is not forfeited, surrendered, or become void or voidable.” It appears not to be the practice of conveyancers in assignments of leases for lives to introduce an express covenant that the lives are still in being; and no instance has been found (beyond the single case which the learning and research of my Brother Willes have brought to our notice) of a covenant of this sort. Here the plaintiffs are driven to contend that there is an implied covenant to that effect; but this is shewn to be an unusual covenant, and surely, if the parties had intended such a covenant at all, they would not have left it to mere implication, but would have, in express terms, both recited and covenanted that the lives were in being. It has been suggested that, when we look at the habendum, which is for the three lives and the survivors or survivor of them, the language amounts to an undertaking that the lives were all in existence at the time of the assignment; but it merely means that the assignee is to hold the whole estate of the assignor, that is, for all or for such of the lives as do survive. As I have said, had the parties intended

1871

COATES
v.
COLLINS.

1871

COATES
v.
COLLINS.

a covenant that the lives were all still in being, there would have been a recital and covenant to that express effect, as in the case referred to by my Brother Willes.

WILLES and KEATING, JJ., and CHANNELL, PIGOTT, and CLEASBY, BB., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Stocken & Jupp.*

Attorneys for defendant: *Routh & Stacey.*

Nov. 28.

[IN THE EXCHEQUER CHAMBER.]

THE QUEEN ON THE PROSECUTION OF THOMAS FLIGHT *v.* THE VESTRY OF ST. LUKE'S, CHELSEA.

Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 68, Effect of, to give Compensation—Construction of special Act consolidating Lands Clauses Consolidation Act.

When the entire Lands Clauses Consolidation Act, 1845, is incorporated in a special Act, no other enactment is required, beyond s. 68, to confer the right to compensation for lands injuriously affected by the works under the special Act.

Ferrar v. London Commissioners of Sewers (Law Rep. 4 Ex. 1), on this point, affirmed.

By the Chelsea Improvement Act, 1845 (8 & 9 Vict. c. cxliii.), s. 83, "so much of the Lands Clauses Consolidation Act, 1845, as is applicable, and is not modified or is not inconsistent with the provisions hereof, shall apply to the improvements authorized by this Act to be made, and shall be read as forming part of this Act." By s. 104 the commissioners under the Act may, subject to the provisions of the Act, alter the level of streets, nothing being said as to compensation. By ss. 124 and 127 the commissioners may remove from houses projections into the street which were existing at the passing of the Act, and also, on the rebuilding of projecting houses, set them back to the line of the street, with a proviso that the commissioners shall make compensation to the owner, &c., in either case.

The commissioners, by raising the level of a street under s. 104, impeded access to the house of which the prosecutor was lessee, and so injuriously affected it:—

Held, affirming the judgment of the Court of Queen's Bench, that the lessee of the house was entitled to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845; and that the fact of compensation being expressly given in cases under ss. 124 and 127 of the Local Act was not inconsistent with the intention that it should be given in cases within s. 104, by virtue of the general enactment in s. 68 of the Lands Clauses Consolidation Act.

ERROR from the judgment of the Court of Queen's Bench in favour of the prosecutor on a case stated on a return to a mandamus.

A mandamus having issued commanding the defendants to take up an award alleged to have been made under the Chelsea Improvement Act, 1845 (8 & 9 Vict. c. cxliii.), and the Acts incorporated therewith, the defendants made a return; and a case was thereupon stated for the opinion of the Court, of which the following is the substance:—

1871

 THE QUEEN
 v.
 ST. LUKE'S.

The prosecutor is the lessee of a house and blacksmith's shop and shoeing shop; the defendants, under the powers of the above Act (s. 104), and the powers vested in them by the Metropolis Management Acts, 1855 and 1862, caused, in 1867, the level of the footway in the street in which the prosecutor's premises were situate to be raised; the consequence of which was to impede the access to the shop, and so to materially damage and injuriously affect the value of the premises.

By s. 83 the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), is consolidated with the local Act; and the prosecutor gave the defendants notice of his claim to compensation, and of the appointment of an arbitrator on his behalf. The defendants denied their liability to pay compensation, and refused to appoint an arbitrator, or to attend before the prosecutor's arbitrator, whereupon the arbitrator proceeded *ex parte*, and made an award.

The question for the Court was whether or not the prosecutor was entitled to compensation.

The Court of Queen's Bench held that he was. (1)

Sir J. B. Karslake, Q.C. (*Raymond* with him), for the defendants, went through the different sections from s. 83 to s. 147 of 8 & 9 Vict. c. cxliii., and contended that, wherever compensation was intended to be given, it was expressly so stated in the Act, and that s. 104 being silent as to compensation, no compensation was intended to be given for the mere raising of the level of a street. Secondly, that this was not an "improvement" within the meaning of s. 83, so that the Lands Clauses Consolidation Act did not apply to the case. And thirdly, if that Act could apply, there was nothing in s. 68 to give compensation, it only applied to the machinery for obtaining compensation in cases where compensation was given by the special Act, or other public Act incorporated therewith;

(1) Law Rep. 6 Q. B. 572.

1871
 THE QUEEN
 v.
 ST. LUKE'S.

and he pointed out that in the Railway Clauses Consolidation Act (8 Vict. c. 20), s. 16, compensation was given in terms; as, also, in the Gasworks Clauses Act (10 Vict. c. 15), s. 6, and the Waterworks Clauses Act (10 Vict. c. 17), s. 6, as mentioned by Hannen, J., in *Ferrar v. London Commissioners of Sewers* (1); and he referred to the doubts expressed by the Court of Exchequer Chamber in that case, as to whether s. 68 did confer any right to compensation, and was not simply confined to the procedure for obtaining it.

Philbrick (with him *H. T. Atkinson*), for the prosecutor, was not heard.

KELLY, C.B. I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. The question raised upon the case is, whether the prosecutor is entitled to compensation by reason of his house having been injuriously affected by the operations of the defendants, under this local Act, in raising the level of the street in which the prosecutor's house is situate. The case depends upon the effect of s. 83 incorporating the Lands Clauses Consolidation Act. The improvement was effected under s. 104, which enacts, "That it shall be lawful for the commissioners at any time, and from time to time, subject nevertheless to the provisions in this Act contained, to alter the level of any street now or hereafter to be formed, laid out, or made, in the said parish, in such manner and form as the commissioners shall deem expedient." Here, certainly, no compensation is expressly given, nor do we find any other provision in the local Act which applies to this particular operation. But then operations under this clause are made "subject to the provisions in this Act contained." Among those provisions is s. 83, which expressly enacts, "that so much of the Lands Clauses Act as is applicable to, and is not modified by, this Act, or as is not inconsistent with the provisions hereof, shall be held to apply to the improvements by this Act authorized to be made, and shall be construed as forming part of this Act." There is, certainly, nothing in this Act which expressly, or, as far as I can see, by implication, takes away any right, or excludes any right to compensation in respect of premises injuriously affected by the

commissioners, or by the vestry, under the Act. Therefore we must look to the provisions of the Lands Clauses Act to see whether, supposing them to be introduced in extenso into this Act, a title to compensation is conferred upon persons whose premises may be injuriously affected by the operations carried out under the authority of the Act.

The section of the Lands Clauses Act which has been principally referred to is s. 68. It begins with these words: "If any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith;" and then follow the provisions as to the machinery or procedure or mode in which compensation, under the circumstances contemplated by this section, shall be made by the company, or by the public body in question. It has been observed (and although it is an observation somewhat critical in its character, I do not say that it is not entitled to great weight), that there is no express title to compensation conferred by the terms of this section upon persons whose property is injuriously affected. But the language assumes that the party to whom the provisions of the section shall apply is already entitled by force of some Act of Parliament to the compensation which he claims. It is not "any party whose property shall have been injuriously affected shall be entitled to compensation," but it is, "if any party shall be entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken or injuriously affected." I forbear to pronounce any opinion as to what would be the effect of this section, if this section alone of the Lands Clauses Act were incorporated in the special Act; because I am clearly of opinion, and I do not think it is open to any reasonable doubt, that the numerous provisions in the earlier portions of the Lands Clauses Act, but especially the 22nd and 23rd sections, in themselves, clearly, directly, expressly, and necessarily, confer a title to compensation upon the persons brought within the Act of Parliament, whose interests are injuriously affected by the operations of any public body within the language of the Act. We have only to look to

1871

THE QUEEN
v.
ST. LUKE'S.

1871
THE QUEEN
v.
ST. LUKE'S.

the numerous sections, beginning as early as s. 18, if not earlier, where the proceedings are pointed out under which persons whose lands are taken are to be compensated for their lands. Of course, where the parties agree, there is no difficulty on the subject; but where there is no agreement, then a series of provisions in the Act is found, which comprise all imaginable cases. A notice is to be given, and the claim is to be sent in, and one mode of procedure is to be resorted to, where the claim does not amount to the sum specified, namely, 50*l.*; and if it amounts to more than 50*l.*, then another mode of procedure is to be resorted to. In all these provisions it is assumed that the lands are taken, or injuriously affected, and the different sections thus referred to clearly point out the mode in which compensation is to be ascertained and made.

When we come to the 22nd section, supposing it is doubtful whether any of the earlier sections apply to such a case as lands not taken, but being only injuriously affected, we find this provision: "If no agreement be come to between the promoters of the undertaking and the owners of or parties, by this Act enabled to sell and convey, or release, any lands taken or required for, or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50*l.*, the same shall be settled by two justices." Now, what is the effect of the words "injuriously affected?" It is perfectly clear that the legislature here contemplated the case, first of lands actually taken or required for the purpose of the undertaking, but they contemplated also a case in which lands, whether taken or required for the purposes of the undertaking, might be (for it is put expressly in the alternative, the word "or" being used) injuriously affected by the execution of the undertaking. In the case of lands being injuriously affected by the execution of the undertaking, the compensation, if the claim does not exceed 50*l.*, is to be settled by two justices. Then follows s. 23, which says, if the compensation claimed or offered in such case shall exceed 50*l.*, then a certain course of procedure is to be adopted. But when two cases, which are perfectly distinct in themselves, are enumerated and expressly stated,

the case of lands taken, and the case of lands injuriously affected, surely it comes within the words "any such case." "If the compensation claimed or offered in any such case shall exceed 50*l.*, and if the party claiming compensation desire to have the same settled by arbitration," then follows a very lengthy provision as to how the compensation is to be ascertained, and in what manner, and under what circumstances it is to be settled.

It appears to me, therefore, first, that this 83rd section does expressly and clearly in itself incorporate into this special Act the whole of the Lands Clauses Act applicable to such a case; and further, when we look at the provisions of the Lands Clauses Act, whatever doubt might exist if s. 68 were alone to be found applicable to the case now before the Court, that doubt appears to me to be entirely removed by the provisions to which I have just adverted, namely, the 22nd and 23rd sections.

I cannot but observe in a case like this, that, whenever it appears that the case is one in which it is plain that very serious injury may have been done to the premises of the party claiming compensation, I think that we must put a liberal construction upon the Acts of Parliament before us in determining the points raised. Unless it is perfectly clear that the language of the different Acts is not sufficiently ample or extensive to embrace the case in question, we ought to hold that a party whose property is injuriously affected, and to a very great extent, by the operations of a public body, shall be entitled in a court of law to compensation.

Numerous cases have been put by Sir John Karslake in his very able argument (and not only hypothetical cases, but cases which might be expressly referred to by some of the sections) where he says it is clear that there is no compensation. One of these cases is, where the level of the pavement is in some degree altered, not raised or depressed merely, and the inequalities of the surface here or there removed or repaired. In such a case as that, and there are three or four other different acts enumerated which may be done before a man's house, such as paving or removing a sewer under the street in front of a man's house, it is clear from the terms of the Act that no compensation shall be made. On the contrary, the occupier of the premises is himself called upon and bound by the Act to do what is necessary in order to

1871

THE QUEEN
v.
ST. LUKE'S.

1871
 THE QUEEN
 v.
 ST. LUKE'S.

remedy the mischief which may exist. But these are cases in which it is impossible to suppose without great exaggeration that any serious injury is done at all. It is a matter for the public benefit—benefit accruing as well to the occupier of the premises as to other persons having houses within the street—where great inconvenience is occasioned, or the party may be subjected even to some slight degree of injury. Every one of the cases referred to are cases in which it is obvious that the injury is slight and inconsiderable. It is in vain to put forward any of these hypothetical cases, for we are dealing with a case in which it is impossible not to see that the man has sustained an injury of a most serious nature.

An argument has been urged, founded upon ss. 124 and 127, and it is said, that, in those two sections of the special Act compensation is by express terms given for any injury done, therefore the rule *expressio unius est exclusio alterius* applies, and that there is nothing in the Act to make anything the subject of compensation where there is no such express provision. I think if we look at the nature of the inconveniences or the acts which are the subject of the sections, the argument is altogether in favour of awarding compensation. Sect. 124 says, "And with regard to all obstructions or projections of the like kind as those before mentioned which have been erected or placed against or in front of any house or other building in any street or public place. The commissioners may if they shall consider any such obstruction or projection to be an annoyance in consequence of the same projecting into, endangering or rendering less commodious the passage along any street within the limits of this Act, cause the same to be removed or altered as they may think fit," and then compensation is to be given. The first case then contemplates something that might be considered to be a nuisance, and therefore it would require, in the removal or doing away with the nuisance, express words to entitle the party to compensation. But the observation I should rather make upon this section is, that it might very well be doubtful whether the putting back or bringing forward of the front of the particular house or particular building could properly be called an improvement within the Act. Putting down pavement from one end of the street to the other, or laying down a

sewer from one end of the street to the other, may be improvements under the Act of Parliament, but it might be doubted by the framers of these two sections whether the act which is contemplated by either of those sections could of itself be an improvement within the meaning of the Act. Therefore the clause as to compensation seems to have been introduced *ex majori cautela*.

The same observations apply to the 127th section. That section enacts, "That when any house or building, any part of which now projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, in any street within the limits of this Act, shall be taken down to be rebuilt or altered," then, on the rebuilding or alteration, the commissioners, or vestry, may be ordered to compensate. The same observations on both points, and upon both grounds, apply to the 127th section as apply to the 124th section.

Then a further argument,—and this is the only one I have now to deal with,—is suggested upon the several sections following the 83rd section, which relate in general only to the purchase of lands. It is said that what is contemplated by the 83rd section in the word "improvements" are solely and only those large improvements provided for in the subsequent sections. I do not know why we should put so limited a construction upon the word "improvement," because, although this 83rd section is immediately followed by the section referred to by Sir John Karslake, it is followed by a number of sections providing for other improvements of a minor character, but still of such a character as might be productive of very serious injury to the property of persons residing within the locality in question.

Under all these circumstances, it appears to me that the grounds entirely fail upon which it is contended that this claimant is not entitled to compensation; for, by the 83rd section of the Local Act, and the 22nd, 23rd, and 68th sections of the Lands Clauses Consolidation Act, he is clearly entitled to the compensation which he seeks for the injury which has been done to his premises.

WILLES, J. I am of the same opinion. I do not wish to add anything to the judgment of the Lord Chief Baron, in which I entirely agree. I wish only to refer, in support of that judgment,

1871

THE QUEEN
v.
ST. LUKE'S.

1871
THE QUEEN
v.
ST. LUKE'S.

9 Ch 121

to the case of *Leader v. Moson* (1), in which an action on the case was brought against the commissioners for paving Wapping Street. The commissioners had power given to them to lay out a new street within certain limits, "so as the same does not obstruct, hinder, or prejudice the lights or free passage that any person hath in his lands, tenements, and hereditaments." There was no such provision with respect to Old Gravel Lane, in which the plaintiff's house was situate. The plaintiff's house in Old Gravel Lane was interfered with by a change in the level of the footpath (in the same way as the prosecutor's house has been interfered with in the present case), and he brought an action against the commissioners. It was said that they had a discretion, and, therefore, they must be at liberty to do what they thought proper within the ambit of the Act. The Court came to the conclusion that they had not an arbitrary discretion, and that it never could have been intended "that any of the householders should pay a rate of 1s. 6d. in the pound in order to have their houses buried underground, and their windows and doors obstructed." The Court, in giving judgment, went on to say, "that had parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose, and given an equivalent for the loss that individuals might have sustained thereby." I agree with the Lord Chief Baron that this is, in effect, what is done by the present statute, and I therefore think that the judgment of the Court of Queen's Bench should be affirmed.

KEATING, J., CHANNELL, PIGOTT, and CLEASBY, BB., concurred.

Judgment affirmed.

Attorney for prosecutor: *H. Batt.*

Attorneys for defendants: *Lee, Pemberton, & Lewis.*

JONES v. HARRIS.

1871
Nov. 23.*Bill of Sale—Description of Residence of Grantor in Affidavit, under 17 & 18
Vict. c. 36, s. 1.*

In the affidavit filed under 17 & 18 Vict. c. 36, s. 1, with a copy of a bill of sale, the deponent stated "that the paper writing hereunto annexed is a true copy of a bill of sale made by Isaac Anthony," and "that the said Isaac Anthony resides at Dynevor Lodge, and is an auctioneer." By the copy of the bill of sale annexed to the affidavit, Isaac Anthony was described as "of Dynevor Lodge, in the parish of Llanarthney, in the county of Carmarthen, auctioneer," which was the true residence:—

Held, that the description in the affidavit of the residence of the person making the bill of sale was not sufficient, but that the copy of the bill of sale, in which the situation of the residence was stated with particularity enough to guide any inquiry as to the identity of the individual, might be referred to, in order to explain and supplement the description given by the affidavit; and that, therefore, the provisions of the statute were satisfied.

INTERPLEADER ISSUE. The plaintiff, grantee under a bill of sale, claimed certain goods therein specified, which the defendant, a creditor of the grantor, had seized under a writ of *fi. fa.*

On the trial before Mellor, J., at the Glamorganshire Spring Assizes, 1871, the plaintiff gave in evidence a bill of sale, expressed to be made "between Isaac Anthony, of Dynevor Lodge, in the parish of Llanarthney, in the county of Carmarthen, auctioneer, of the one part," and the plaintiff, "David Jones, of Wern, in the said parish of Llanarthney, gentleman, of the other part;" it was duly executed by the grantor, and attested. The affidavit, sworn at Llandilo, in the said county, by the attesting witness and filed with a copy of the bill of sale, contained the following statements: "That the paper writing hereto annexed is a true copy of a bill of sale made or given by Isaac Anthony to David Jones, of Wern, in the parish of Llanarthney, in the county of Carmarthen, gentleman . . . That I was present and did see the said Isaac Anthony sign and execute the said bill of sale; and that the said Isaac Anthony resides at Dynevor Lodge, and is an auctioneer." Evidence was given of the execution of the bill of sale; and that Isaac Anthony lived at Dynevor Lodge, in Carmarthenshire, and the parish of Llanarthney, eight or nine miles from Llandilo, and about the same distance from Dynevor Park—a nobleman's seat; and that a letter directed to "Isaac

1871

JONES
v.
HARRIS.

Anthony, Dynevor Lodge," would reach the person to whom it was addressed.

The learned judge directed a verdict to be entered for the plaintiff, reserving leave to move to enter a verdict for the defendant.

A rule was accordingly obtained, on the ground that Isaac Anthony, the grantor of the bill of sale to the plaintiff, was not so described in the affidavit filed with the bill of sale as to comply with the statute 17 & 18 Vict. c. 36. (1)

A. de Rutzen (*H. S. Giffard, Q.C.*, with him) shewed cause. If the description of the residence is true, and contains sufficient information to guide a person making inquiry, then the provisions of the statute are satisfied. In the affidavit the grantor of the bill of sale is truly described as living at Dynevor Lodge; the affidavit contains a distinct reference to the bill of sale; and if the bill of sale and affidavit are read together, it appears at once that Dynevor Lodge is in the parish of Llanarthney, in the county of Carmarthen, and it is there that the grantor lives, so that no one could be misled by the description in the affidavit. *Pickard v. Bretz* (2) will be relied upon for the defendant, but in that case, as in many others which may be cited, there was a total omission of something required by the Act. The correct rule is laid down by Blackburn, J., in *Hewer v. Cox* (3) in these words: "All that is required is, that the description shall be such as to convey to creditors dealing with the maker of the bill of sale a reasonable knowledge of the identity of their debtor with that person." By s. 7 of 29 & 30 Vict. c. 96, the particulars of bills of sale registered are to be entered in a book at the master's office, in the Court of Queen's Bench, according to a given form, where a search can be made on payment of a small fee, so that any creditor can gain all the information he requires. Here it is found as a fact that letters directed to the grantor at Dynevor Lodge would reach him. A similar fact was relied on in *Briggs v. Boss*. (4) In that case the description of the

(1) 17 & 18 Vict. c. 36, s. 1, enacts that "Every bill of sale . . . or a true copy thereof . . . shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the

same . . . be filed . . . in the Court of Queen's Bench within twenty-one days after the making or giving of such bill of sale . . ."

(2) 5 H. & N. 9; 29 L. J. (Ex.) 18.

(3) 3 E. & E. 428, at p. 436; 30 L. J. (Q.B.) 73, at p. 76. *6 Jun MS 11340*

(4) Law Rep. 3 Q. B. 268.

(2) 5 E. & E. 428, at p. 436; 30 L. J. (Q.B.) 73, at p. 76. 6 Jun MS 11340

attesting witness in his affidavit was "Hanley, in the county of Stafford, accountant." Hanley was a place with 40,000 inhabitants, yet the description was held to be sufficiently minute to enable a stranger making reasonable inquiries to find out the person described. In *Thorp v. Browne* (1), a statute requiring "the usual or last known place of abode" of a judgment debtor, to be stated in an affidavit, was held to be satisfied by a description of him as "formerly of Ballina Park, in the county of Wexford, and now of the city of Dublin, Esquire." Lord Colonsay says: "Omission of statement or error of statement is very different from vagueness of statement; and when vagueness of statement is pleaded, then it is important to consider what is the object for which the statement is required by the statute." Here was a description of the residence given by the affidavit in direct compliance with the Act, and if reasonable inquiries were made the person described could easily be found.

C. E. Coleridge (*H. James, Q.C.*, with him), in support of the rule. The residence must be described in the affidavit itself. A description by reference to the bill of sale will not suffice. The affidavit is sworn to, and therefore perjury could be assigned upon a false statement contained in it. There is no averment of any true description in the bill of sale. It is quite consistent with the affidavit that the description given in the bill of sale is not the true one: *Pickard v. Bretz*. (2)

[BLACKBURN, J. *Routh v. Roublot* (3) seems more in point, and is adverse to the defendant's argument.]

It is distinguishable, for, as Erle, J., said, the affidavit was abundantly clear for the purposes for which it was required, and therefore the Court held that the requirements of the Act were satisfied. Absence of due description invalidates the affidavit: *Allen v. Thompson*. (4)

[BLACKBURN, J. There the description was untrue.]

In *Hatton v. English* (5), Coleridge, J., said, "The bill of sale must be filed, together with a description of the residence and occupation

1871

JONES
v.
HARRIS.

(1) Law Rep. 2 H. L. 220, 236.

(2) 5 H. & N. 9; 29 L. J. (Ex.) 18.

(3) 1 E. & E. 850; 28 L. J. (Q.B.)

240.

(4) 1 H. & N. 15; 25 L. J. (Ex.)

249.

(5) 7 E. & B. 94; 26 L. J. (Q.B.)

161.

1871

JONES
v.
HARRIS.

of the assignor. It is, therefore, impossible to say that such a description in the bill of sale itself is a compliance with the Act." That case is directly in point.

[BLACKBURN, J. No; for there was entire absence of description in the affidavit.]

"Dynevot Lodge" is, in effect, no description.

[BLACKBURN, J. The house exists.]

"Dynevot Lodge," of itself, means the lodge at Dynevot Park. In *Brodrick v. Seale* (1), Willes, J., said, "It has been established in so many cases, that the description required by the Act is a true description, that it would be waste of time to refer to any authority for that proposition." The description of the judgment-debtor in *Thorp v. Browne* (2) identified him.

COCKBURN, C.J. I am of opinion that this rule must be discharged. There is no doubt that the Act of Parliament requires that the affidavit, which is to be filed with a copy of the bill of sale, should contain a statement of the residence of the party making the bill of sale; but the Act does not specify to what extent of particularity the description of the residence must be carried. We have therefore to put a construction on the meaning of the word "residence," and I think that what is meant and intended thereby is a reasonably sufficient description of a residence, which would guide the inquiries of a person who may be interested in knowing whether the individual, about whom he desires to inquire, and to whom he is about either to advance money, or to supply goods on credit, or whom he proposes to otherwise trust, has made any disposition of property by way of a bill of sale. In fact, to enable the party to make such investigations as would be necessary for his protection before he either advanced money or supplied goods on credit.

I think it may be taken that the description in this particular affidavit would not be, of itself, sufficient to satisfy the provisions of the Act of Parliament. The statement of the residence as "Dynevot Lodge" is plainly insufficient to lead the inquiries of a person not possessed of a peculiar local knowledge as to what was meant by "Dynevot Lodge." It has been held, indeed, in the

(1) Law Rep. 6 C. P. at p. 103.

(2) Law Rep. 2 H. L. 220.

House of Lords, that the description of a particular house, when coupled with a statement of the county in which it is situate, would suffice, and no doubt the name of the house of some person of note or distinction in a county would suffice to guide persons desirous of making inquiries as to the individual alleged to reside there. Nothing, however, would be more absurd than to suppose that a mere description of an obscure person as residing in a particular county, where fifty people of the same name might also dwell, would be enough.

I agree, therefore, that the description of "Dynevov Lodge," without anything further to fix the locality or certain area within which the house may be situate, is not enough. But then comes the question, whether resort may be had to the bill of sale itself, by which Dynevov Lodge is fixed with respect to a given local area, viz., the particular parish in which it is situate, and whether the description in the affidavit may be supplemented by reference to the bill of sale. True, in *Pickard v. Bretz* (1) it was decided that the bill of sale could not be referred to to supply the defect of the affidavit, because there was nothing in the affidavit which verified the description given in the bill of sale; but that otherwise the latter instrument might have been looked at seems to have been taken for granted; and Watson, B., says: "I agree that, provided the affidavit shews the occupation by reference to the bill of sale, that would be sufficient. But this affidavit does not; it neither states what the occupation is, nor whether the occupation mentioned in the bill of sale is correct." If here, in fact, there was no description whatever of the residence, we should be bound by that case, and it would not be possible to refer to the bill of sale to supply the total defect of the affidavit. But in this case there is an attempt at description of residence which, so far as it goes, is admitted to be true. The affidavit states that the person making the bill of sale resides at "Dynevov Lodge." The objection is that "Dynevov Lodge" is left ambiguous, and the identity of the house is not fixed; but that is only a difficulty arising from ambiguity, and it may, I think, be cured by a reference to the bill of sale. In the bill of sale "Dynevov Lodge" is described as being in a particular locality, and the moment the party seeking information turned

1871

 JONES
v.
HARRIS.

(1) 5 H. & N. 9, 12; 29 L. J. (Ex.) 18, *5 June 1884*

1871

 JONES
 v.
 HARRIS.

to the bill of sale, he would find that the ambiguity in the affidavit was explained away by reference to the bill of sale. And I do not see why for that purpose the bill of sale should not be looked at. I think that there is a description, true as far as it goes, but which is ambiguous; the ambiguity, however, is removed by reference to the bill of sale. The case of *Routh v. Roublot* (1) is a strong authority to shew that for such a purpose the bill of sale may be referred to. Let that reference be made in the present case, and the description becomes sufficiently certain and precise.

BLACKBURN, J. I am also of opinion that the rule must be discharged. I think that our decision in no way clashes with the cases previously decided, and is within the spirit and meaning of the Act of Parliament. The Act requires that the bill of sale, or a true copy thereof, be filed within a certain time, "together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same. . . ." The construction put on those words—and the correct one—is, that the description required shall be by affidavit. Upon that there are several cases which have been referred to in the argument, tending to decide that where the affidavit is absolutely silent as to the residence, the fact that the bill of sale contains a description of the residence is not enough; because the object of the statute was that the description of the residence should be given with the security of having it sworn to; and therefore that the description should be in the affidavit, and, consequently, when the description can in no way be made out to have been sworn to, the provisions of the statute are not satisfied. As in the case of *Brodrick v. Scale* (2), where the description is partially inaccurate and fails in something, it is no description at all. In the cases relied on in support of the rule, the affidavits contained no description, and therefore the statute was not complied with. But when, as in the present case, we have an affidavit in which a description both of the occupation and residence is actually given, and it is sworn that the bill of sale is executed by Isaac Anthony, of Dynevor Lodge, auctioneer, the question comes to be

(1) 1 E. & E. 850; 28 L. J. (Q.B.) 240.

(2) Law Rep. 6 C. P. 98.

5 Jan 25 1871

whether that description, viz., that he resides at Dynevor Lodge, is a sufficient compliance with the statute, which requires a description of the residence to be given. The case of *Thorp v. Browne* (1) lays down the principle which is nowhere better expressed than in *Hewer v. Cox* (2), by Wightman, J., who, delivering judgment almost in the very words the Lord Chief Justice has just used, and quite in their spirit and sense, observes that the object of the statute was to require the residence to be stated with such an amount of fullness that persons about to give credit should have sufficient information to guide them to the identity of the man whom they intend to trust, and, consequently, that his residence should be described with, not too minute, but, reasonable certainty and sufficiency. Accordingly, in *Briggs v. Boss* (3), where an accountant had a residence at Hanley, and his principal occupation was to manage the affairs of another, whose name was put up over the door, but he did some business for himself, and there was scarcely another accountant in the town, or, if there were others, he was perfectly well known and anybody could have pointed him out, we thought the description of him as of "Hanley, in the county of Stafford, accountant," was quite sufficient to enable an ordinary person to ascertain his identity. If his business had been of a more common kind, or one by which he would be less known, possibly a fuller description would have been required; for to merely describe the residence of John Smith, "workman" or "retail dealer," as being in "Hanley," a town of 40,000 inhabitants, would hardly be enough. Here I think that the description "Isaac Anthony, of Dynevor Lodge," would not be at all sufficient of it itself, for this reason, viz., that if a man living in London had proposed to lend money to Isaac Anthony, an auctioneer in Wales, and, on searching the register of bills of sale, found no more description of residence than "Dynevor Lodge," that would not have given him the slightest additional information. But if he looked there and read "Dynevor Lodge, in the parish of Llanarthney, in the county of Carmarthen," he would at once have been guided, and had he sent down to ask who lived at Dynevor Lodge, in the parish of Llanarthney, I make no doubt that he would

1871

JONES
v.
HARRIS.

(1) Law Rep. 2 H. L. 220.

(2) 3 E. & E. 428; 30 L. J. (Q.B.) 73. (3) Law Rep. 3 Q. B. 268.

6 Jan 1848

1871
JONES
v.
HARRIS.

have been told that the auctioneer lived there, and no one would have supposed, as was suggested in argument, that the inquiry was for the porter at the lodge belonging to Dynevor Park. Then can it be said that Anthony appeared from the affidavit to reside at Dynevor Lodge in the parish aforesaid? It was urged that the copy of the bill of sale which is made an exhibit cannot possibly be used at all in aid of the affidavit because it is not sworn to; but it may, nevertheless, be looked at in order to understand the affidavit, as *Routh v. Roublot* (1) most clearly shews. The affidavit there ran:—"I, Isaac Simpson, clerk to Frederick Lewis Lyne, of No. 12, Pancras Lane, in the City of London, gentleman, make oath and say . . . that the paper writing hereunto annexed marked A. is a true copy of a bill of sale . . . and of every attestation of the execution thereof by Charles Boutell; that I was present and did see the said Charles Boutell in the said bill of sale mentioned, and whose name is signed thereto, sign, seal, and as his act and deed deliver the same," &c. Then the maker of the affidavit swore to and signed it. The objection taken to it was, that it did not describe the attesting witnesses; and the Court looked at the bill of sale attached, and reading there that it was "signed, sealed, and delivered by the above-named Charles Boutell in the presence of Isaac Simpson, clerk to F. L. Lyne, solicitor, 12, Pancras Lane, City," the Court said that when Simpson declared in his affidavit that he was present and saw the bill of sale executed, could any reasonable creditor, looking at the affidavit, have the slightest doubt that he meant to describe himself, and swear that he was attesting witness? So here, when we find the witness swears that Isaac Anthony resides at Dynevor Lodge, and at the beginning of the same affidavit he refers to a copy of the bill of sale in which is a description of Anthony as residing at Dynevor Lodge, in the parish of Llanarthney, in the county of Carmarthen, we cannot reasonably doubt that the Dynevor Lodge meant was Dynevor Lodge in the parish of Llanarthney, in the county of Carmarthen, which would be quite enough to guide a person making inquiry. I do not say that it would be always sufficient to state the parish. The question is ever one of degree. A description of the residence of the Duke of Devonshire as "Chatsworth" would not need the addition "in

(1) 1 E. & E. 850; 28 L. J. (Q.B.) 240.

5 Jan 25 548

the county of Derby." Possibly to describe a residence of the Duke of Buccleuch as being in "Scotland" would be sufficiently precise. Sometimes it may be enough to state the kingdom merely, sometimes the county, sometimes the parish, in which the person may dwell; and as the position of the individual is lower on the scale of society, so more particularity of description becomes necessary. But Dynevor Lodge in the parish and county named would be quite enough information to guide creditors about to lend money to the maker of the bill of sale in the present case.

1871

JONES
v.
HARRIS.

MELLOR, J. I am of the same opinion. I think that our decision will not be found to conflict with any others upon the Bills of Sale Act. At the trial the bill of sale was put in evidence, and the circumstances of the execution proved. The learned counsel did not desire that any question should be put to the jury, and was content to rely on his objection to the affidavit. We have now to decide whether that description, which we think would be insufficient if standing alone, may be amplified by reference to the copy of the bill of sale annexed to the affidavit. The affidavit required by the statute is one in which the deponent must state the day of execution, and the name of the maker of the bill of sale, his residence and occupation. The deponent in the affidavit now before us begins by alleging that "the paper writing hereto annexed is a true copy of a bill of sale made or given by Isaac Anthony to Daniel Jones" . . . and proceeds to aver that "I was present and did see the said Isaac Anthony sign and execute the said bill of sale, and that the said Isaac Anthony resides at Dynevor Lodge, and is an auctioneer." Now there is a description of residence on the face of the affidavit, and the only question is, whether that statement of residence, which is not sufficient, may be made out, explained, and supplemented by the bill of sale which has been described as the bill of sale which Isaac Anthony executed, and at the very commencement of which he is stated to be "of Dynevor Lodge, in the parish of Llanarthney, in the county of Carmarthen." The mere want of sufficient minuteness in the description in the affidavit is but a question of degree, and the deficiency may be supplied by reference to the bill of sale. I feel perfectly satisfied that our judgment is in furtherance of

1871
JONES
v.
HARRIS.

justice and common sense, and that it would be a hardship to upset this bill of sale, in which everything appears to be bonâ fide and in compliance with the Act, for want of particularity of statement in the affidavit. I think, therefore, that this rule must be discharged.

Rule discharged.

Attorney for plaintiff: *Thomas Clark.*

Attorneys for defendant: *Ingledeu, Ince, & Greening.*

Nov. 27. MARSHALL v. THE ULLESWATER STEAM NAVIGATION COMPANY.

Trespass—Navigation of Lake, Obstruction of.

10 Ch 687
691-2
App Cas 666
669, 676

The plaintiff was the owner of the soil forming the bed of a navigable lake, and also of a pier which had been thereon erected wrongfully by a third person. The defendants, in common with the public, had the right of navigating the lake, and were the lessees, from the person who erected the pier, of the land adjoining that part of the lake where the pier was erected, and therefore had a right to embark and disembark, at the land leased by them, passengers using the defendants' boats on the lake. The pier was maintained by the plaintiff, and from its position prevented the defendants from getting with their boats to the land leased by them when landing and taking on board passengers:—

Held, that the defendants were justified in causing passengers to pass and repass over the pier between their boats and the land leased by them.

CASE stated by a judge's order, without pleadings.

Trespass to a pier or jetty of the plaintiff, and causing persons to go, pass, and repass over and upon the pier or jetty, and there to embark or disembark from steamboats or other boats and vessels.

1. In April, 1859, H. W. Askew, the owner of some land adjoining Ulleswater Lake, and within the manor of Glenridding, entered into the following agreement with the defendants:—"I do hereby on behalf of myself, my heirs, and assigns grant to the Ulleswater Steam Navigation Company through my field a right of way parallel to the River Glenridding, connecting the public road with the Beckfoot and with the pier (which is about to be erected), for the term of twenty-three years, the company paying me for the same 10*l.* per annum during the years ending April, 1860 and 1861, and 20*l.* per annum for the remaining twenty-one years of

the above term; the rent to be paid at the expiration of each current year from date hereof. The above-named right of way and pier are granted on the above terms to the company upon the distinct understanding that they are to be used by the company exclusively for purposes in connection with the steamers, such as conveying, landing, and shipping passengers and light luggage only, but to the entire exclusion of lead, ore, coal, lime, minerals, or other heavy goods; and if such are conveyed on the above-named road, the annual rent will be 100*l.* during the remainder of the lease from the date at which such heavy goods are so conveyed. I also undertake to construct upon the above-named right of way a good and sufficient road (to connect the public road with the pier), and also a proper and commodious pier for shipping and landing passengers and goods, to the satisfaction of the secretary to the company by the 10th of June, 1859, for the sum of 200*l.*—100*l.* of which is to be paid to me by the Ulleswater Steam Navigation Company on the 20th of May, and the remaining 100*l.* when the road and pier are completed.”

2. Askew afterwards made and constructed the road and pier.

3. By a lease, dated the 18th of July, 1859, and made for the carrying out of the agreement, Askew, for the considerations therein mentioned, granted and demised to the defendants all that parcel of ground situate in the parish of Barton, in the county of Westmoreland, adjoining the Lake Ulleswater, as then marked out and intended for a pier and road then in progress of formation by the lessor, provided always, and it was by the lease expressly agreed and declared that the pier should be used by the lessees, their officers and servants exclusively, for traffic in light goods, or for the landing and departing of passengers from and to the boat of the lessees with or without passengers' luggage, and with or without the carriages of passengers and the horses or other animals used for drawing the same, and not for any other use or purpose whatsoever. This lease is still subsisting; the road and pier therein mentioned were and are the road and pier agreed to be constructed by the agreement of April, 1859.

4. The pier or jetty was made and constructed by Askew, and paid for by the defendants, pursuant to the agreement. Part of the pier was made upon land belonging to Askew and leased to

1871

MARSHALL
v.
ULLESWATER
COMPANY.

1871
MARSHALL
v.
ULLESWATER
COMPANY.

the defendants; the remainder of it was made on the bed of the lake, which was and is the soil and freehold of the plaintiff. The foundations of that portion of the pier which extends into the lake, and which is 27 ft. 6in. long, consist of piles driven into the soil or bed of the lake. The defendants from the time of the making of the pier or jetty in the year 1859, up to the present time, have used, and still use it, for the purposes mentioned in the agreement and lease of 1859.

5. In June, 1860, the plaintiff commenced an action against the defendants for breaking and entering land of the plaintiff covered with water, being a part of Ulleswater Lake, and with steamboats of the defendants coming into, and upon, and sailing upon, and over the land covered with water, to and from a certain pier or jetty of and belonging to the plaintiff, and wrongfully causing persons to go upon the pier or jetty, and there to embark on, or disembark from the steamboats, and wrongfully causing the said persons to sail in the steamboats upon and over the land covered with water. The defendants pleaded in that action a plea of "not guilty;" and also a plea that the land, &c., was not the land of the plaintiff; and, thirdly, as to the whole declaration except so far as it related to the acts complained of in respect of and as to and concerning the pier or jetty, the defendants pleaded that there was a common and public highway for all the liege subjects of Our Lady the Queen to sail, navigate, pass, and repass upon the waters of that part of the lake in the declaration mentioned, with boats, vessels, and steamboats, at all times of the year, at their free will and pleasure, and that the acts complained of, and therein pleaded to, were an use by the defendants of the highway. The defendants, by a 4th plea, traversed that the pier or jetty was the plaintiff's. The plaintiff joined issue upon all the pleas, and also new assigned as to the 3rd plea, as to which new assignment the defendants pleaded "not guilty," upon which issue was joined.

6. The cause came on to be tried at the summer assizes of the year 1861, at Appleby, when a verdict on the issue joined upon the defendants' third plea was found in favour of the defendants, and a verdict as to all the other issues was found in favour of the plaintiff. A rule nisi was afterwards obtained by the defendants

in the Court of Queen's Bench to set aside the verdict on the issues so found in favour of the plaintiff, and instead thereof, to enter the verdict thereon for the defendants, pursuant to leave reserved at the trial, which rule was, upon argument, discharged. Judgment was thereupon entered accordingly, and upon an appeal by the defendants to the Court of Exchequer Chamber, the decision of the Court of Queen's Bench, in discharging the rule, was affirmed: *Marshall v. Ulleswater Steam Navigation Co.* (1)

1871
MARSHALL
v.
ULLESWATER
COMPANY.

7. The land covered with water, which is referred to in the action of June, 1860, included that portion of Ulleswater Lake which adjoins the land leased by Askew to the defendants, and the pier or jetty also referred to in the same action is that portion of the pier or jetty which extends into the lake as herein mentioned. The latter portion of the pier or jetty was made and constructed without the plaintiff's consent, and against his will, and has never been removed, and still remains as originally built.

8. If that portion of the pier or jetty which so extends into the lake were removed, the defendants would be able to bring their steamboats upon that portion of the lake which lies near to the land leased to them by Askew, and so near that, by means of a temporary stage or platform extending from the steamboats to that portion of the pier or jetty which is built upon the land leased to the defendants by Askew, they could disembark, and land passengers and goods from such steamboats, on the land leased to them by Askew, and also embark passengers and goods in such steamboats from the land; but in consequence of that portion of the pier or jetty which extends into the lake having been made and constructed, and not having been removed, and remaining as it was originally built, the defendants are prevented from disembarking and landing and embarking passengers and goods without using that portion of the pier or jetty which extends into the lake.

9. The waters of the lake, at the part where the same adjoins the land leased to the defendants, are so shallow that it would be impossible for the defendants to bring their steamboats so near their land that they could land passengers and goods from the

(1) 3 B. & S. 732; 32 L. J. (Q.B.) 129. *g/m 25988*

1871
MARSHALL
v.
ULLESWATER
COMPANY.

steamboats directly upon their land, or take passengers or goods on board the steamboats directly from their land without either a temporary or permanent stage or jetty, or platform being placed over and across the bed of the lake between the defendants' land and the steamboats.

10. Since the judgment in the action of June, 1860, was entered and affirmed, the defendants have on many occasions brought their steamboats upon the lake near to the land so leased to them by Askew, for the purpose of disembarking, and landing, and embarking passengers, and goods from and upon such steamboats upon and from the last-mentioned land, and because that portion of the pier or jetty which extends into the lake had not been removed, but remained as originally built, so that without using that portion of the pier or jetty for the purpose of landing and embarking passengers, they could not land and embark passengers and goods, they used that portion of the pier or jetty for the purpose.

11. The user by the defendants of that portion of the pier or jetty which extends into the lake, for the purposes, and in the manner hereinbefore mentioned, was without the leave or consent of the plaintiff, and against his will.

12. On the 18th of July, 1867, the present action was brought in respect of the use by the defendants, for the purposes aforesaid, of that portion of the pier or jetty which extends into the lake at and during periods subsequent to the times to which the former action related.

13. The Court were to be at liberty to draw any inferences which a jury might draw.

The question for the opinion of the Court was, whether the use by the defendants, for the purposes aforesaid, of that portion of the pier or jetty which extends into the said lake was legally justifiable under the circumstances above stated.

Manisty, Q.C. (Forbes with him), for the plaintiff. The pier is part of the plaintiff's freehold, and the defendants have no right to use it.

[MELLOR, J. In *Lade v. Shepherd* (1) it was held that the owner of the soil of a street which he had dedicated to the public,

might maintain an action against the proprietor of adjoining land who had rested one end of a plank on the road, so as to form a bridge from his premises.]

The defendants may navigate the waters of the lake, but must not touch the soil of the plaintiff. If they wish to land from their steam-vessels, which cannot come close to shore, they should do so by means of small boats. Even placing a gangway from the vessels to land would be a trespass, for *cujus est solum ejus est usque ad cœlum*, and the public have a mere right of navigation. As the original erection of the pier was a wrongful act of the defendants, being a trespass to the freehold of the plaintiff, and also an obstruction to the navigation of the lake, they cannot justify themselves in using the pier by alleging that it is an obstruction to the public right, and thereby take advantage of their own wrong.

Holker, Q.C. (*Kemplay* with him), for the defendants. If the pier did not exist, the steam-vessels might be brought as near as possible to the shore, and the defendants might land their passengers by means of a boat; and they would have an equal right to do so by means of a gangway. But the pier is there, and is an obstruction. The defendants need not, however, remove it themselves, for they may use it: *Eastern Counties Ry. Co. v. Dorling*. (1) The defendant there was held justified in passing over the plaintiffs' barge, which was permanently moored in a navigable river so as to obstruct the approach of the defendant to a quay at which he had a right to land. That case would exactly resemble the present, if the plaintiff had erected the pier; but the fact of Agnew having built it makes no real distinction. The obstruction, although created by another, was maintained by the plaintiff; and the maxim that no man shall take advantage of his own wrong does not apply, for the continued existence of the pier is not the fault of the defendants.

Manisty, Q.C., replied.

BLACKBURN, J. Our judgment must be for the defendants. I think that to the complaint of the plaintiff a good defence might be pleaded. The admitted facts are, first, that the plaintiff is owner of the soil forming the bed of Lake Ulleswater, including

1871

MARSHALL
v.
ULLESWATER
COMPANY.

1871
MARSHALL
v.
ULLESWATER
COMPANY.

the part upon which the pier stands; secondly, that the public have a right of highway over the lake, without any restriction as to the use of vessels, except that which is imposed by the breadth and depth of the water. It is well-established law, that where there is a public highway the owners of land adjoining thereto have a right to go upon the highway from any spot on their own land. (1) They cannot, of course, pass over the soil of others without leave; and he who has dedicated the road to the public at large has no right to complain that a particular individual has come upon it at one spot rather than another. Consequently, every person in the vicinity of Lake Ulleswater whose land abuts on the edge of the lake has a right to come down to the brink of the water for the purpose of going upon it to exercise the public right of navigation, which is admitted to exist.

Now, I apprehend that where there is a right of that kind the necessary incidents are involved in it, and therefore that, on a navigable river like the Thames, where a person with his barge has to come to the land, it is not essential that he should find some spot where the water is so deep that the barge can float up to the bank close enough to enable him to step ashore, but that he has the reasonable and usual modes of disembarking incidental to the navigation of vessels; if the water were a few feet in depth he would probably use a boat; if very shallow, he could wade, or, if his vessel lay conveniently near, he might place a plank across from it to land. And, therefore, the rule of law is, that the owner of the adjoining land, and those whom he permits to go thereon, have a right to cross to and from their vessels by either wading or walking over a plank, but that they have no right to disturb the soil covered with water, as by permanently fixing anchors. Mr. Askew and the defendants had a right to go on his land before this pier was built, by wading or using small boats, or throwing a plank across from their vessels; they had the public right so to do. We have next to ascertain what is the effect of building the pier. Now, Mr. Askew erected a pier on his own land, as he justly might; but it seems that he carried it out twenty-six feet further on piles driven into the bed of the lake, and so interfered with the ground of the plaintiff, and

(1) See the late case of *St. Mary, Newington v. Jacobs*, ante p. 47.

committed a trespass, in consequence of which the plaintiff acquired a right to knock down so much of the pier as extended into the lake, or to take it as annexed to and part of his soil. He has adopted the latter alternative; for, bringing this action, he says, in effect, "I have got this pier, and I complain of you, the defendants, for wrongfully causing persons to pass over and upon it, in order to embark and disembark, and sail across Ulleswater lake." It seems to me that he is completely assuming that the pier has become his own, saying, "I use my right of property thus acquired for the purpose of prohibiting any one of the public from going on the lake at that particular spot, and I will bring an action against you if you encourage the public to come." That is as positively maintaining the pier, and maintaining it with the object of preventing the public from getting to the boats, as well can be.

It is not denied that if, as in *Eastern Counties Ry. Co. v. Doring* (1), the plaintiff himself had made and maintained this pier, persons obstructed by it would have a right to step on it to get to the boats. The ordinary plea of obstruction to a right of way is, that the party either broke the obstacle, or removed it, doing no unnecessary damage. Here, any one entitled to embark or disembark at Mr. Agnew's premises might say, "I found this pier preventing me going on or from the lake; I did not knock it down, but put my foot on it to get across." It seems to me that he would be perfectly right to justify thus if the pier had been put up by the plaintiff. Then what possible difference does it make that it was put up by another person under his, the plaintiff's, own eyes? None. Mr. Manisty argues that this is a case of a man taking advantage of his own wrong. Mr. Askew, however, did not cause this pier to be erected for the purpose of obstructing navigation, but for the very purpose of assisting it. Unfortunately, he raised his pier on the land of another, who, instead of using it to facilitate, uses it to interfere with navigation. That, in my opinion, is clearly maintaining it, and puts the plaintiff into the same position as if he had built it; therefore I think that, if this case turned on a plea, it would be sufficient to allege that the plaintiff maintained the pier in such a place that it was impossible for the

1871

MARSHALL
v.
ULLESWATER
COMPANY.

10 CL 68

(1) 5 C. B. (N.S.) 821; 28 L. J. (C.P.) 202. *5 Apr 1889*

1871

MARSHALL
v.
ULLESWATER
COMPANY.

public to use their right to navigate without either knocking down or removing it, and therefore, the defendants, having a right to go, went, doing no unnecessary damage, across the pier. In my judgment, that would be a good plea; and it would not be a good replication to say, "It was erected by you, or by persons to whom you are privy."

MELLOR, J. I have come to the same conclusion. I was not at first free from doubt, nor is the doubt yet altogether removed; but I think that my Brother Blackburn's view is quite consistent with good sense, which induces me to agree in the judgment. I am not prepared to dispute in any way the doctrines enunciated by him; my only difficulty has arisen from the circumstances under which this pier was erected, but, on the whole, I think it cannot make any difference whether the pier was built by the plaintiff himself, or by Mr. Askew wrongfully in the bed of the lake. The plaintiff must now be supposed to say: "This pier is mine, and you are wrongfully inducing people to come upon it," which amounts to the same thing as if the plaintiff had erected the pier himself.

LUSH, J. I do not share in the doubt my Brother Mellor has expressed. It appears to me to be a very clear case, and I think the plaintiff is in precisely the same position as if he had built the pier himself. It was erected by wrong on his soil. He might have had it removed at the expense of the wrongdoer. Instead of doing so he exercised the right he undoubtedly had to claim it as part of his own property. He took possession of it, exercised dominion over it, and now claims, by this action, damages in respect of his right of property. That puts him in exactly the same position as if he had built it, or bought it when built. He maintains the pier for the purpose of obstructing the navigation of the lake; the defendants say: "That pier obstructs us and our right of navigation, and so long as it exists, in consequence of that portion of the pier or jetty which extends into the lake having been so made and constructed, and not having been removed, and remaining as it was originally built, we, the defendants, are prevented from disembarking and landing and embarking passengers and goods without using that portion of the pier or jetty which

so extends into the lake." If the pier were not there they would have the right of bringing steamboats as near their own land as they could, and would have the right of making use of any reasonable means in order to reach the land; it appears to me that is incident to the ordinary right of navigation. They would have been able to do so if the obstruction were not there. That brings the case within *Eastern Counties Ry. Co. v. Dorling*. (1) The pier prevents the defendants using their right of navigation, and therefore they have a good justification for passing over it; just as in the case of a person placing a gate across a high road, or maintaining it there, and then seeking to bring an action against a person, who could not use his right on account of the gate, for trespass by climbing over it.

1871

MARSHALL
v.
ULLESWATER
COMPANY.

Judgment for the defendants.

Attorneys for plaintiff: *Bell, Brodrick, & Grey.*

Attorneys for defendants: *James, Curtis, & James.*

STIMSON v. FARNHAM.

Nov. 25.

Sheriff, Action against—False Return—Estoppel—Actual Damage.

The plaintiff, an execution creditor, delivered a writ of fi. fa. to the sheriff, who proceeded to execute it by seizing goods upon the premises and apparently the property of the execution debtor, but which were then, in fact, in possession of the holder of a bill of sale to whom they had been previously assigned. The sheriff remained on the premises until dismissed by the plaintiff's attorney, and, being directed to return the writ, made a return, that he had seized goods of the debtor and kept them until ordered by the plaintiff's attorney to withdraw from possession. To an action brought by the plaintiff against the sheriff for not levying under the writ, and for a false return, the defendant pleaded (*inter alia*), *nulla bona*, and at the trial, set up, as his sole defence, the bill of sale, which the jury found to be valid; and a verdict was entered for the defendant:—

Held, that actual damage was necessary to support the action; that the defendant was not estopped by his return from proving that the goods seized did not belong to the debtor; that as they were found to be the property of the assignee they were not available for sale under the execution; and that, therefore, the plaintiff had sustained no damage from the conduct of the sheriff, and could not maintain the action.

DECLARATION, against the defendant as sheriff, for not levying under a writ of fi. fa., and for a false return that he had seized the

(1) 5 C. B. (N.S.) 821; 28 L. J. (C.P.) 202.

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5 Jan 4 1889

1871

STIMSON
v.
FARNHAM.

goods and chattels, in his bailiwick, of the execution debtor, and kept them safe until he received from the attorney of the plaintiff an order to withdraw from possession of the same.

Pleas: 1. Not guilty. 2. Except as to the claim in respect of the return, nulla bona. 3. That after seizure of the goods by the defendant the plaintiff ordered him to withdraw from possession, whereupon the defendant did so, and made the return complained of.

Issue thereon.

At the trial, before Mellor, J., at the sittings in Middlesex in Easter Term, 1871, it appeared that the plaintiff had recovered judgment against one Henry Fellows, for 74*l.*, and had delivered a writ of *fi. fa.* to the defendant, the sheriff of Leicestershire, commanding him to levy that sum. The sheriff's officer accordingly went with the writ to the premises of the execution debtor, and seized goods there, which were, however, then in the possession of a claimant under a bill of sale. At the request of the plaintiff's attorney the sheriff's officer remained on the premises until dismissed by him. In the mean while the goods were sold under the bill of sale. The plaintiff demanded a return to the writ, and the defendant thereupon returned that he had seized the goods and chattels of Henry Fellows, and kept them safe in his possession until the 19th of September, 1870, when he received from the attorney of the plaintiff an order to withdraw from possession, and that he then withdrew from such possession. In support of the second plea (upon which alone he relied), the defendant adduced evidence to prove that all the goods apparently belonging to the execution debtor in his bailiwick had, prior to the seizure, been assigned under the bill of sale.

The learned judge asked the jury whether the assignment by the bill of sale was valid or not; they found it to be valid; and a verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff for 77*l.*

A rule was accordingly obtained, on the ground that the defendant was concluded by his return.

Mundell, Q.C., and *Abbott*, shewed cause. As the assignment was valid the goods did not belong to the execution debtor; therefore the plaintiff has suffered no loss through the conduct of the de-

fendant, and cannot maintain the action. It is the duty of a sheriff to execute a writ directed to him, and to make a true return. But this duty is only imposed upon him for the benefit of the creditor; and if he can absolutely negative the possibility of any advantage accruing to the creditor from the performance of his duty, the creditor will not be entitled even to nominal damages: Mayne's Law of Damages, p. 4; *Williams v. Mostyn* (1); *Wylie v. Birch*. (2) Secondly, the defendant was not estopped by his return from proving that the goods seized were not the property of the debtor: *Remmett v. Lawrence*. (3) There a sheriff returned to a fi. fa., that by virtue of a writ previously delivered to him by another creditor he had seized goods of Webb, the debtor; and to an action for a false return he pleaded not guilty, and other pleas in denial of there having been goods of Webb which were, or might have been seized under the plaintiff's writ. It was held that the sheriff was not estopped from shewing that the goods did not belong to Webb.

[BLACKBURN, J. In *Levy v. Hale* (4) Williams, J., points out that in *Remmett v. Lawrence* (3) Lord Campbell says, "If he had returned that he had taken Webb's goods, and had them in his hands for want of buyers, he would have been estopped from denying that the goods were Webb's," and, upon counsel arguing that the observation of the Chief Justice was an obiter dictum without authority, Williams, J., cited *Mildmay v. Smith* (5); *Clerk v. Withers* (6); adding that it was "too strong to say that there is no authority in favour of what Lord Campbell says in *Remmett v. Lawrence*." (3)]

The judgment, however, in *Levy v. Hale* (7) supports the present contention. The doctrine of estoppel, stated in *Pickard v. Sears* (8), does not apply to the present case, for the position of the plaintiff was not altered by the false return: 2 Sm. L. C., 6th ed., p. 769; Notes to *Duchess of Kingston's Case*. The onus of shewing actual damage from the falsehood of the return rests on the plaintiff, who has not proved any. The sheriff is a ministerial officer, and

1871

 STIMSON
v.
FARNHAM.

(1) 4 M. & W. 145.

(2) 4 Q. B. 566.

(3) 15 Q. B. 1004; 20 L. J. (Q.B.) 25.

(4) 29 L. J. (C.P.) at p. 130.

(5) 2 Wms. Saund. 343.

(6) 2 Ld. Raym. at p. 1075.

(7) 29 L. J. (C.P.) 127.

(8) 6 Ad. & E. at p. 474.

1871

STIMSON
v.
FARNHAM.

is not estopped by the formal return which he is compelled to make.

Field, Q.C., and *J. W. Mellor*, in support of the rule. The defendant was estopped by his false return, as the plaintiff acted upon it by bringing the action.

[BLACKBURN, J. That is an attempt to extend the doctrine in *Pickard v. Sears* (1) much further than it has ever been carried.]

It might well go to that length. In *Field v. Smith* (2) a sheriff had levied and sold goods under a *fi. fa.*, and, after receiving information that the debtor had petitioned the Insolvency Court, returned *fieri feci*; and it was held that he was bound by that return. The passage above cited from the judgment of Lord Campbell in *Remmett v. Lawrence* (3) is much in favour of the present plaintiff. Two courses were open to the sheriff, he might either have returned *nulla bona* or have interpleaded. He adopted neither. Matters subsequent may defeat a return, as in *Standish v. Ross* (4); but there was no matter subsequent in this case. All the facts were known to the defendant when he deliberately made his untrue return. At least he might have applied to amend it.

COCKBURN, C.J. I am of opinion that this rule must be discharged. The action is founded on tort, for a wrong done by the sheriff in making this return, which was in one sense a false return. Now the rule respecting such actions against a sheriff is, that, not only must a wrongful act have been committed, but damage must have been thereby caused, in order to entitle the person injured to maintain the action. That fundamental rule would apply here, unless the present case is shewn to be excepted from it. It has been argued that this being an action against a sheriff for a false return, he is concluded by the return he has made. We must look to see whether there is any sufficient authority for saying that this case forms an exception to the general principle governing actions of this character. The authority most relied upon is a dictum by Lord Campbell in *Remmett v. Lawrence* (3), where, I would remark that, it was altogether an obiter dictum, and quite unnecessary to the decision of the case. Therefore,

(1) 6 Ad. & E. at p. 474.

(3) 15 Q. B. 1004; 20 L. J. (Q. B.) 25.

(2) 2 M. & W. 388.

(4) 3 Ex. 527.

1871

 STIMSON
 v.
 FARNHAM.

although respect is due to anything said by that distinguished judge, yet the dictum in question will not bind us if we see our way, on principle, to a different conclusion. The authorities relied on as supporting that dictum are those referred to by Williams, J., in *Levy v. Hale* (1), viz., *Mildmay v. Smith* (2), and *Clerk v. Withers*. (3) Now, in *Mildmay v. Smith* (2) the sheriff had suffered goods seized under an execution, and returned by him as of a certain value, to be rescued out of his hands, and the Court held that a scire facias lay against him of the money according to the value returned. It was there argued that the sheriff is in no case chargeable for the debt on a fieri facias, unless he returns that he has the money in his hands . . . "Sed non allocatur; for the sheriff by his return of the rescue has put the plaintiffs to the end of their suit; for they cannot sue a new execution, except only for the surplus of their debt, over and above the 160*l.*; and the Court cannot award a venditioni exponas, because it appears that the goods are out of the sheriff's hands: 34 Hen. 6, 36 a. Therefore the plaintiffs ought to have a writ of debt, or scire facias, on the return against the sheriff . . . or, as here, otherwise they are without remedy. . . . But true, it is, if the sheriff do not misbehave himself, he is not chargeable in debt or scire facias, unless it appears by his return that he has the money in his hands; as if he returns, 'I have taken, and caused to be seized into my hands, goods and chattels to the value of 160*l.*, which remain in my hands for want of buyers;' there, on this return, he is not chargeable in debt or scire facias, because he has not misbehaved himself, but has done his duty, for there is no default in him." Now observe what follows. "But it is otherwise here, for he has suffered the goods to be rescued out of his hands, which is a great fault in him. Wherefore the judgment was affirmed as aforesaid." In the other case of *Clerk v. Withers* (3), Lord Holt said, "The sheriff is answerable for the value of the goods after he has seized them, and is bound to sell them at all events, and he is bound to the value he has returned them to be of. And though the goods are lost or rescued from him, he is bound, not to that value which they may after appear or be found to be of, but to the value

(1) 29 L. J. (C.P.) at p. 130.

(2) 2 Wms. Saund. 343.

(3) 2 Ld. Raym. 1075.

1871

STIMSON
v.
FARNHAM.

he returned them to be of; that is the value he is bound to, and an action of debt lies against him for that value. And that is the case in Saunders' Reports (2nd part, 343, *Mildmay v. Smith*), and by the same reason he is compellable to sell them according to that value." Both those cases were cases of scire facias, and neither was like the present, which is an action of tort; therefore, I think those authorities do not apply, and I find no ground for saying that the tort in the case we have now to consider forms any exception to the general rule already stated. Here it is clear that no damage was sustained, for the moment it was ascertained that the bill of sale was bonâ fide and valid, no matter what the return of the sheriff had been, the goods were not available, they could not have been sold for the benefit of the plaintiff, the execution creditor, and, therefore, he has not suffered. It may be that the sheriff is to some degree blameable for having taken the course of making this return, or for not adopting the usual and plainly available remedy of interpleading; but we are not to consider how far the sheriff is open to reprehension on that account. The question is whether the present case has been shewn to be any exception to the general rule in actions of tort brought against a sheriff. I find no authority for saying that it is, and the rule must therefore be discharged.

BLACKBURN, J. I am also of opinion that the rule must be discharged. An action against a sheriff for a false return will not lie unless actual damage has been caused to the plaintiff; and in the present case, on the finding of the jury that the goods seized were not the debtor's goods, there was no damage, and the action will not lie. But, then, was the sheriff estopped by his return? The general rule is, that what a man says is evidence against him, and nothing more. He may shew that what he said was a wilful untruth. Nevertheless there are a good many cases in which a man is not permitted to contradict his assertions, and in which he is precluded, or, in technical language, estopped from doing so; as in the cases of *Pickard v. Sears* (1) and *Freeman v. Cooke* (2). But I do not see anything to bring this return of the sheriff that the goods seized were goods of the debtor,—a mere averment prelimi-

(1) 6 Ad. & E. at p. 474.

(2) 2 Ex. 654.

nary to his answer,—within the principle of estoppel, and I do not understand why the fact of his being sheriff should make it operate as an estoppel. Where the sheriff has made a return by which he shews a state of things such as that the plaintiff is entitled to receive the money, there the question is quite a different one, for the sheriff says he has money in his hands belonging to the plaintiff. The plaintiff, according to the record as it then stands, is entitled to have the money. *Mildmay v. Smith* (1) was not an action for false return. The sheriff had returned that he did seize goods of the debtor, and should have levied the debt, but that they were rescued out of custody. The plaintiffs brought an action on scire facias, and the Court of Common Pleas held that the sheriff was bound by his return, and, consequently, that the plaintiffs were entitled to have execution against him for the value of the goods, as he should have been prepared with sufficient force to resist those people who came to the rescue. Then error was brought, and it could not be denied that the return was bad, but an attempt was made to impugn the judgment of the Court below, because credit had been given for the value of the goods, as returned by the sheriff; to which the answer of the Queen's Bench in effect was, "He has by his own fault put the plaintiffs to an end of their suit; for they cannot sue a new execution, except only for the surplus of their debt over and above the sum returned, and we cannot order the goods to be sold because they are out of the sheriff's hands." And so on those proceedings the sheriff was estopped. That seems reasonable enough. Again, the case of *Clerk v. Withers* (2) related to quite a different matter: Lord Holt there, considering the effect of the execution creditor dying after seizure and before sale, points out that the position of the creditor was altered by the goods having been seized: for that he had no further remedy against the judgment debtor, but must proceed against the sheriff, who was bound to sell the goods, and was bound to the value he had stated them to be of in his return, and was not hindered from selling by the death of the execution creditor. And *Mildmay v. Smith* (1) was cited. Neither of those cases are authorities for saying that the present defendant was estopped by his return. Then in *Remmett v. Lawrence* (3) is a

1871
STIMSON
v.
FARNHAM.

(1) 2 Wms. Saund. 343.

(2) 2 Ld. Raym. 1075.

(3) 15 Q. B. 1004; 20 L. J. (Q.B.) 25.

1871

STIMSON
v.
FARNHAM.

passage which is the only authority supporting the argument for the plaintiff. Lord Campbell, C.J., is reported to have said that if the sheriff had returned that he had got the debtor's goods, he would have been estopped. The observation may possibly have been misunderstood, but more probably, the learned judge in forgetfulness used inaccurate language. The dictum was cited in the case of *Levy v. Hale* (1), by Williams, J., whose observations merely shew that he had not made up his mind that Lord Campbell was not right. But the two cases he cited do not support the dictum, nor do I see any principle upon which it could be supported. I am therefore of opinion that this rule must be discharged.

MELLOR, J. I am of the same opinion. When the rule was moved we thought it should not be granted, but *Remmett v. Lawrence* (2) was cited, and we gave this opportunity for examining the dictum upon which the plaintiff's counsel mainly relied. I do not regret that we did so, as the question has now been thoroughly discussed, and we find the authorities satisfactorily shew that in actions such as this against a sheriff there is no exception to the ordinary rule that not only must a tort have been committed, but actual damage must have resulted therefrom in order to entitle the plaintiff to recover. There was, in this case, no damage, and consequently the rule must be discharged.

Rule discharged.

Attorney for plaintiff: *J. Briggs.*

Attorneys for defendant: *Robinson & Preston.*

(1) 29 L. J. (C.P.) at p. 130.

(2) 15 Q. B. 1004; 20 L. J. (Q.B.) 25.

POUND, APPELLANT; THE PLUMSTEAD BOARD OF WORKS,
RESPONDENTS.

1871
Nov. 11.

LORD NORTHBROOK, APPELLANT; THE PLUMSTEAD BOARD OF
WORKS, RESPONDENTS.

Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105—"New Street"
—*Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102),*
s. 77—"Owners of Lands"—Liability of Owners of Lands and House to
pave new Street.

The words "new street," as used in the Metropolis Management Acts, include a new street in the ordinary and popular sense of the term; and, therefore, a country lane, which was bounded by hedges and fields, and was repaired by the parish time out of mind, becomes a new street within the meaning of that statute when houses are built along the sides of the lane.

The Metropolis Management Amendment Act, 1862, s. 77, provides that, where any vestry or district board shall have paved any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expense of paving the same:—

Held, that the words "land bounding or abutting on such street" include the soil of private roads leading out of a new street.

Prior to the passing of the Metropolis Management Act, 1855, an ancient highway, which was a country lane, and had been repaired by the parish from time out of mind, existed in a district within the Act: after the passing of that statute, and before the passing of the Metropolis Management Amendment Act, 1862, twenty-one houses were built along the side of the lane, several of which belonged to P.; afterwards ninety houses were built along the sides of the lane. N. was the owner of the soil and freehold of five new private roads leading out of the lane; but he had no exclusive occupation or possession of them:—

Held, that the lane, after the erection of the houses, became a "new street" within the meaning of the Acts; that P. and N. were the owners of land bounding or abutting thereon, and that they were liable to contribute to the expense of paving the same.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43.

1. The question was as to the powers of the Plumstead District Board of Works (hereinafter called "the board") to pave a certain portion of a certain road in the parish of Lee, in their district, commonly known as Burnt Ash Lane, and to charge the expense to the owners of the houses adjoining, and of the land bounding the road or abutting thereon, under the provisions of 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77. (1)

(1) 18 & 19 Vict. c. 120, s. 105: ing the greater part of any new street
"In case the owners of the houses form- laid out or made, or hereafter to be laid

2/
SQB 9
9QB 282
285
10QB 16
23-7
-204-8
12D 22
227, 230
-341
12D 24
21CD 6
831
804 (C
689 69
-799, 80

1871

POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

2. On the 23rd of June, 1869, the appellant Pound was summoned for the recovery of 112*l.* 16*s.* 6*d.*, being the aggregate amount of the various sums assessed upon the several houses and portions of land of which he is the owner; and the appellant, Lord Northbrook, was summoned for the recovery of 144*l.* 13*s.*, being the aggregate amount of the various sums assessed upon several roads of which he is the owner. The magistrate ordered that the several appellants should pay the amounts sought to be recovered from them respectively.

out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway or footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board); and in case such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid, and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses."

25 & 26 Vict. c. 102, s. 77: "Where

any vestry or district board shall, under the powers given by the 105th section of the firstly recited Act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein: provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the costs of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable, either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years; and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board."

4. On the 1st of January, 1856, when the Metropolis Management Act came into operation, Burnt Ash Lane (hereinafter called "the highway") was an ancient highway and public carriage road leading in a north and south direction from Lee Green, in the parish of Lee, in the county of Kent, to Bromley, in the same county. It was a public thoroughfare for carriages, of an average width of forty feet, or thereabouts, between the hedges hereinafter mentioned, of which a width of about eighteen feet, or thereabouts, had been time out of mind repaired as hard road by the parish, leaving the remainder in grass on each side of the road. This grass was bounded on each side of the road by a watercourse, outside which was a bank and hedge separating the watercourse from the adjoining lane. At the northern end of the highway, on the west side, were six houses, which fronted towards a road running across the highway, and leading from Eltham to Lewisham. At the back of these houses, and at a distance of sixty feet, or thereabouts, from the highway was a seventh house (called "Eagle Cottage"), fronting towards the highway, and having a path leading therefrom to the front door. At the same end, on the east side, was a pond, which was filled up by the board in the course of the year 1856, and which discharged itself into the watercourse on the east side of the highway. Beyond the pond was an orchard, belonging to a farm called "Lee Green Farm," the buildings of which farm were at a distance of from 100 to 200 feet from the highway.

5. On the west side of the highway, and at a distance of 850 feet from the north end, was a house, lately built by the appellant Pound, called Stratton Villa, situate seventy feet from the centre of the highway, and occupied together with a plot of ground fifty feet wide and 200 feet deep, on which it stands, and which forms a forecourt and back garden to the house.

6. On the 1st of January, 1856, no other houses existed along this part of the highway which the board has paved, or proposes to pave, or had approaches thereto, but the ground on either side (except the orchard) consisted of open fields cultivated as ordinary farm land.

7. Between the years 1856 and the 7th of August, 1862, the date of the passing of the Metropolis Management Amendment Act, 1862, twenty-one additional houses had been built on the

1871

POUND

v.

PLUMSTEAD
BOARD OF
WORKS.

1871

POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

west side of the highway; of these the six at the northernmost end were semi-detached, the space between each pair of houses being ten feet or thereabouts. A space of about fifty-five feet was then left for a road (which was afterwards formed and called "Taunton Road"), and then a block of four houses was built; on the south of these are six detached houses, the space between each being ten feet or thereabouts, which left about the same space between the southernmost of these six and Stratton Villa. Another space of about fifty-five feet was then left for a road (afterwards called "New Road"), to the south of which five more detached houses were built, the distance between the first and the second being thirty feet or thereabouts, and the distance between each of the others being thirteen feet or thereabouts. The whole of these twenty-one houses were built to the same line of frontage as Stratton Villa, and had forecourts and gardens of the same depth, and extended along the highway 1100 feet from the north end. The appellant Pound is owner of several of these houses, which were built prior to 1862, and part of the claim of the board against him is in respect of these houses.

8. On the 31st of January, 1861, the board approved of a certain plan laid before them by the appellant Pound setting out a line of frontage for the forecourts of houses on the east side of the highway to the extent of 1200 feet. The line of frontage was staked out on the land some time in the year 1861, and posts were put down marking the permanent boundary between the forecourts and the road. As a condition for the approval the board had required that the highway should be made throughout of the width of fifty feet, and in consequence the appellant Pound laid into the highway a strip of land on the east side sufficient to comply with this condition. The highway being already fifty feet wide for a length of about 200 feet at the north-east corner, nothing was there laid in. The line of the frontage so approved of and marked out was that on which the line of the forecourts was subsequently built. A plan for the drainage of the above proposed houses was submitted to the board in May, 1861, but was disapproved of, and an amended plan was approved of in January, 1863. The building of the houses was commenced shortly afterwards, viz., in January, 1863.

9. Between the 7th of August, 1862, and issuing of the summonses, a line of railway had been constructed by the South Eastern Railway Company, crossing the highway in question nearly at right angles to it, and at a distance of 850 yards or thereabouts southwards from Lee Green. It is this length of road extending to 850 yards or thereabouts which the board allege to be a new street within the meaning of the Metropolis Management Acts, and the portion which they have paved, or propose to pave, under the powers thereby conferred on them, is so much as is not comprised in the eighteen feet mentioned in the 4th paragraph as having been repaired as hard road. All the houses mentioned in this case are in and upon this length of road, and the board have apportioned the estimated expenses of paving the same upon the owners of all the houses. The appellant Pound is owner of several of the houses, some of which were built prior to August, 1862, and part of the claim of the board against him is in respect of the houses.

10. Subsequently to the 7th of August, 1862, four houses with frontages on the highway were built, commencing from the southernmost of the houses mentioned in par. 7; an interval of fifty feet was there left for another road called "Handen Road," to the south of which twelve additional houses with the same frontages were built. Another interval of fifty feet was there left for another road, which is a private road; six more houses were there built. All these houses were detached or semi-detached houses. To the south of these houses was a plot of ground not built upon; adjoining this plot is a public-house called the "Lord Northbrook;" on the south side of the public-house is an interval of fifty feet left for a road called "Southbrook Road;" to the south of which is a row of ten houses in one block.

13. Before the 7th of August, 1862, nothing had been built on the east side of the highway, but between that date and the date of the summonses fifty-six houses had been built on that side. Of these, the most northerly, built in the corner between the highway in question and the Lewisham and Eltham Road, abuts immediately upon the highway, and the plot of ground occupied with it extends in a southerly direction for 105 feet or thereabouts along the highway. There is then a road ten feet in width immediately

1871

POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

1871
— POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

to the southwards of which is a row of ten houses called "Crown Terrace," which have a frontage of 230 feet in the whole in one line at a distance of thirty-five feet or thereabouts from the centre of the highway in question.

14. At the south end of Crown Terrace are seven detached houses, the spaces between which vary from ten to twenty feet, and they are followed by twenty-four semi-detached houses, the spaces between the pairs being twenty feet or thereabouts. All these houses, both detached and semi-detached, are constructed upon the same line of frontage, each having a forecourt about thirty feet in depth between the front and the highway in question.

15. On the south side of the most southerly of the last-mentioned semi-detached houses a space of forty feet is left for a road called D'Orville Road; and south of this road comes a row of houses built in two blocks, five in each block, the first being called "Oxford Terrace," and the second "Cambridge Terrace," and the space between the two blocks being ten feet or thereabouts. South of Cambridge Terrace is a space of eleven feet left for a private road, and to the south of this are two blocks of houses, one consisting of three and the other of two houses. The first of these is at a distance of thirty feet from the last house in Cambridge Terrace, and there is a space of about thirty-five feet between the two blocks. The rest of the land between the last of these houses and the land belonging to the South Eastern Railway Company, consisting of a frontage of 500 feet or thereabouts, is not yet built upon.

16. From the commencement of Oxford Terrace to the last house the same general line of frontage is maintained. The houses stand at the same distance from the highway in question as the detached and semi-detached houses mentioned in the 14th paragraph, but owing to a bend in the highway, they deviate from the line of frontage given by the detached and semi-detached houses sufficiently to follow the bend.

17. In the year 1862, and before the passing of 25 & 26 Vict. c. 102, the board received an application from the owners to construct a sewer which had become necessary for the drainage of the new houses on the highway which had by that time been built. The board agreed to the proposal on condition that the owners paid two-thirds of the expense, and constructed on these

conditions 1350 feet, commencing at the north end. Subsequently, in the year 1865, the sewer was carried on a further length of 1050 feet, and in 1867 a further length of 2110 feet, the board having agreed to construct the further lengths on the same conditions.

18. In the year 1856 the board constructed a footpath on the western side of the highway, commencing at Lee Green, of eight feet in width and 1100 feet in length, and paved the same; and have, from the time of its construction, repaired the same. In the year 1863 the board constructed a similar footpath, on the eastern side of the highway, of the length of 300 feet and eight feet in width, in front of Crown Terrace, and have since the construction repaired the same. At the time of the constructing the path last mentioned, the board made a hard carriage-road on the spaces then remaining, between the footpaths and the eighteen feet of hard road which had always existed, so as thereby to construct a hard road comprising the whole of the width between the footpaths, and have since repaired the same. All the expenses of the above works were defrayed, and repairs paid for by the board, out of the general rates. All the expenses were included in the estimates of the costs sought to be recovered from the appellants.

19. On both sides of the highway in question the building plots on which the houses stand are actually contiguous, except where the roads occur. Many of the houses above mentioned have been and are occupied, and such houses have, from the time of occupation, been rated by the board for the same purpose and to the same extent as all the other occupied property in the district.

20. In consequence of the erection of so many new houses, 112 in all, of which ninety have been built since the 7th of August, 1862, the board have now determined it to be necessary to form and pave proper and convenient pathways each side of the highway, similar to and in continuation of those already formed, and paved as mentioned in paragraph numbered 18, and a portion of the road, to the width of eight feet, is intended to be appropriated on each side for that purpose; and the board have also determined to make, in continuation of the length of 300 feet constructed in 1862, a hard carriage road along the residue of the highway, on the spaces between the footpaths and the eighteen feet of hard road which has always existed.

1871

POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

1871

POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

21. In order that such paving of the footpaths and carriage roads as have now been determined on by the board may be done, and that the expense of doing such as has been previously paved may be repaid to the board, the board have caused proper estimates to be made of the cost of the whole works and have apportioned the cost among the several owners of houses and land bounding and abutting on the highway, under the powers of 25 & 26 Vict. c. 102, s. 77. The several appellants are such owners of houses and land so bounding or abutting on the highway, and the amount sought to be recovered from each is admitted to be his share under such apportionment, assuming the board are entitled to recover the cost of the whole works, and provided also as to Lord Northbrook, that he is liable to be charged as stated in the next paragraph.

22. The five new roads on the west side of the highway are at present private roads, and Lord Northbrook is the owner of the soil and freehold thereof, and the amount sought to be recovered from him by the board (144*l.* 13*s.*) is charged upon him solely as the owner of the private roads, considered as land within s. 77 of 25 & 26 Vict. c. 102, according to the width left between the forecourts of the houses in the highway forming the corners of the private roads, and such amount is charged at the same rate, and in all other respects as the frontage of houses is charged. Lord Northbrook has no exclusive possession or occupation of such private roads, the same having been laid out and formed for the common use of the lessees and occupiers of property in the private roads, and the several leases by Lord Northbrook grant such common use to the several lessees and their tenants. The most northerly of the private roads, called "Taunton Road," is just within 300 feet of the highway, over which the board made a hard road in the year 1863.

The appellants contend that the board has no power to cast upon the owners of the houses and land adjoining to and in and upon the highway, as the cost of paving the same, the amounts now sought to be recovered.

The board contend that they have such power.

Willis for the appellant Pound. The first question is whether

the erection of houses on land adjoining a highway, which has always been repaired by the parish, constitutes the highway a new street, within s. 105 of 18 & 19 Vict. c. 120. That section enacts that if a new street is not paved to the satisfaction of the vestry, the vestry shall pave the same, charging the expenses to the owners of the houses adjoining the street. The whole space from fence to fence is the highway, *Reg. v. United Kingdom Electric Telegraph Company* (1), and so much of it as was required for the traffic has time out of mind been repaired by the parish, and if the traffic had increased, the parish would have been bound to metal and keep the whole width of the road in repair. When the houses were built, this highway would become a street within the definition of s. 250 of 18 & 19 Vict. c. 120, but it would not be a new street within s. 112 of 25 & 26 Vict. c. 102; for that section only applies to streets formed and laid out, and to streets the maintenance of the paving and roadway whereof had not previously to the passing of that Act (that is, 7th August, 1862) been taken into charge by the commissioners having control of the pavements or highways in the parish in which such streets are situate. A new street, therefore, means a street new in the sense that it would not come on the parish for repairs, or a street which no one would be liable to repair: *Sawyer v. Paddington*. (2) Houses were built on part of the land adjoining the highway, before the passing of 25 & 26 Vict. c. 102, that statute cannot apply to that part of the highway so as to constitute it a new street. It may be said that, as the highway was widened, it would become a new street within s. 98 of that Act, but this was done before that Act passed, and therefore that section is inapplicable. The 25 & 26 Vict. c. 102, only applies to new streets, the roadways of which were laid out since the passing of that Act. A point somewhat analogous to the present arose under s. 69 of 11 & 12 Vict. c. 63, and it was decided in *Hirst v. Halifax Board of Health* (3), and in *Wallington v. White* (4), that a highway which had been repairable by the inhabitants at large was not a new street. Those cases are applicable to the present. The

1871

 POUND
 v.
 PLUMSTEAD
 BOARD OF
 WORKS.

(1) 2 B. & S. 647, n; 31 L. J. (M.C.) 166. *See MS 1153.*

(2) Law Rep. 6 Q. B. 164.

(3) Law Rep. 6 Q. B. 181.

(4) 10 C. B. (N.S.) 128; 30 L. J. (M.C.) 209. *See MS 1013*

1871

POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

second question is whether the board can recover against the appellants the expenses of the work done in 1856 and in 1863, and which has been paid for out of the general rates. On this point he referred to parr. 18, 19, 20, and 21, and cited *Taylor v. Metropolitan Board of Works*, (1) and *Whitchurch v. Fulham Board of Works*. (2)

[*Brown, Q.C.*, for respondents, admitted that the proportion of expenses incurred by the respondents in 1856 and 1863, could not be recovered from the appellants, and that the apportionment was for too large an amount.]

10QB23. *G. Tayler*, for the appellant, Lord Northbrook. In addition to the points already discussed, there is a third point with regard to Lord Northbrook. Is he the "owner of land" within the meaning of s. 77 of 25 & 26 Vict. c. 102? The private roads mentioned in par. 22 intersect the highway, and so abut on it, but "owner of land bounding or abutting on such street," means owner of property capable of being let, and owner who receives rent. The definition as given in s. 250 of 18 & 19 Vict. c. 120, is, "the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used." "Owner," therefore, is the person receiving rack rent, or who would receive it if the land were let. These private roads cannot let at rack rent.

Brown, Q.C. (*Barrow* with him), for the respondents. The private roads are land, and abut on the street. The paving of the street is a benefit to Lord Northbrook; it makes the approach to his property more accessible. If the roads were let, it would bring a rent, and if they were not let, they being an accommodation to the houses which are being built would enhance the value of the building land, and so indirectly bring a profit. [On the other points he was stopped.]

COCKBURN, C.J. Mr. Brown having given up one part of his case, which presents great difficulty, the questions for our decision are, first, whether the highway in question is a new street within the meaning of the Metropolis Management Acts; and, secondly whether, in respect of roads running into this new street, Lord Northbrook, the owner of the soil of the roads, is liable to pay

(1) Law Rep. 2 Q. B. 213.

(2) Law Rep. 1 Q. B. 233.

this assessment. Upon the first point, I do not entertain any doubt. This is land which was occupied by a highway. Each side of that highway has now been covered with houses, so as to make it become in the ordinary sense of the term a street. The sections to which our attention was drawn do not, I think, shew that a highway, when converted into a street, is not within the meaning of the Act. The language of the definition in s. 112 of 25 & 26 Vict. c. 102, is made to include certain other things, but it does not exclude, that which, independently of such enactment, would be a new street. It is quite plain that, as regards a highway converted into a street, all the reasons for the provisions contained in this Act of Parliament as to the paving of streets apply; and there can be no distinction between a piece of ground laid out for the first time as a street, and so made a highway, and a piece of ground, which was previously a highway, and was converted into a street.

With regard to the liability of Lord Northbrook the question is whether he, having applied some of his land to the making of accommodation roads for the occupiers of houses on his estate, is the owner of land within s. 77 of 25 & 26 Vict. c. 102, and therefore liable to contribute to the expenses of paving; and that is a question upon which there ought to be no reasonable doubt. These pieces of land forming the soil of the roads, if still occupied in the ordinary way, would be liable to the rate. Why are they to be exempted because they are converted into roads? Either Lord Northbrook receives direct compensation for the use of the roads in the shape of payment, or has the advantage of such roads for the occupiers of his property, which enhances the value of the houses which he lets; and he therefore gets compensation for the loss of this land, as regards the purposes for which, otherwise, it would be applicable, in the shape of rent that he gets for those houses. Lord Northbrook has, therefore, the valuable use of these roads, and there is no reason why he should not contribute to the expense of paving the street upon which these roads abut, just as if the roads were land used for agricultural or other purposes.

BLACKBURN, J. I am of the same opinion. The facts upon the first question are these: At the time the Metropolis Management

1871

POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

10QB25

1871

POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

Act, 1855, passed, Burnt Ash Lane was a country lane which no person would, in the ordinary sense, call a street; it was a lane which was a highway. Subsequently to the passing of the Act, houses were built on each side, and it was converted into what any one, in common parlance, would call a street; that is, a place with continuous houses on each side. Then s. 105 of the Act says, if the owners of houses adjoining any new street shall want it paved, or if the vestry think it ought to be paved, it shall be paved by the vestry, and the expense charged upon the owners of the houses forming the street. I think that it is plain the legislature are here using the word "street" in its ordinary popular and natural sense, and mean a place with continuous houses on each side. Then the interpretation clause (s. 112 of 25 & 26 Vict. c. 102) enacts the expression "new street" shall apply to and include certain streets and places. It does not enact that the word "street" shall be confined to the things enumerated in that section, but that it shall include them. That is perfectly intelligible. The legislature, in s. 105, from the context shew that they are using the words "new street" in the ordinary and natural sense of the word; and it does not follow that because, in the interpretation clause, they say the expression "new street" shall include certain other things, we are to say it does not include its own natural sense. When a highway, which was not a street in the popular sense of the word, but merely a country lane, became a street by the building of houses continuously on each side of it, it then became a new street within the meaning of the statute, and the board had a right to pave it and charge the expenses upon the owners of the adjoining houses.

With regard to the second question, it would appear that the expense incurred in 1856 and 1863, is included in the present claim. Mr. Brown admits that this is an error, and that there ought to be a re-apportionment of the expenses, omitting this item. That being so, the magistrate's decision will be reversed: but as both parties desire our decision on the other questions, which are the main questions in the case, and we decide them against the appellants, there will be no costs to either side.

The last question turns upon s. 77 of 25 & 26 Vict. c. 102, which enacts that the owners of the land bounding or abutting on such

street shall be liable to contribute to the expenses of paving the same, as well as the owners of houses. Is Lord Northbrook the owner of land abutting on the street? The facts are that Lord Northbrook is the owner of land adjoining the street, and he has converted this land into private roads, for the purpose of having access to some other property which he has laid out for building purposes; and no doubt he derives a profit from the land which he has converted into private roads. *Bowditch v. Wakefield Board of Works* (1) seems to be in point. The question there was whether a trustee of a school was liable to the expenses of paving the street along which the school fronted. It was argued that, as he was a bare trustee, and could not let the school or derive any profit from it, he ought not to be held liable. But there was no reason for holding that a building used as a school should not be rated. The trustee was owner of the land, and would probably get back the expenses from those for whom he was trustee. I cannot see why, in the present case, Lord Northbrook is not the owner of land merely because he chooses to use it for an artificial purpose.

MELLOR, J., concurred.

Judgment accordingly.

Attorneys for appellants: *Eagleton & Mason.*

Attorney for respondents: *J. M. Dale.*

(1) Law Rep. 6 Q. B. 567.

1871

POUND
v.
PLUMSTEAD
BOARD OF
WORKS.

10QB2

1871

Nov. 17.

[IN THE EXCHEQUER CHAMBER.]

MOUNTSTEPHEN *v.* LAKEMAN.

Statute of Frauds (29 Car. 2, c. 3) s. 4—Promise to be answerable for Debt of Another—Evidence of Promise to be primarily liable.

1989 201

The plaintiff had been employed to construct a main sewer by a local board of health, of which the defendant was chairman. When the sewer was nearly completed the board gave notice, under 11 & 12 Vict. c. 63, s. 69, to the occupiers of the adjoining houses, to connect their drainage within twenty-one days, or the board would do the work at their expense. Before the twenty-one days had expired, the plaintiff, having completed the sewer, was about to leave the place with his carts, &c., when the defendant sent after him, and the following conversation took place. The defendant said, "What objection have you to making the connections?" The plaintiff replied, "I have none, if you or the board will order the work, or become responsible for the payment." The defendant replied, "Go on and do the work, and I will see you paid." The plaintiff accordingly did the work under the superintendence of the surveyor of the board; and sent in the account to the board debiting them with the amount. The board refused payment on the ground that they had not authorized the order; and after more than two years, the account being still unpaid, the plaintiff made a claim and brought an action against the defendant.

The above evidence having been given by the plaintiff, the defendant denied that any conversation of the kind deposed to ever took place; the jury found that it did take place, and a verdict passed for the plaintiff, leave being reserved to enter a nonsuit.

The Court of Queen's Bench made the rule absolute to enter a nonsuit, on the ground that the conversation did not amount to an undertaking of the defendant to be primarily liable for the work; but only to a promise that if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not, and that this was a promise to be answerable for the debt of another person within s. 4 of the Statute of Frauds, and not being in writing could not be enforced. On appeal:—

The Court of Exchequer Chamber reversed the judgment, on the ground that there was evidence on which the jury might have found that the defendant agreed to be primarily liable.

Reversed by H of L. 1627 H L 17

APPEAL by the plaintiff from the decision of the Court of Queen's Bench, making absolute a rule to enter a nonsuit.

The following is the substance of the pleadings and case:—

First count: That defendant was chairman of the local board of health of Brixham, and in consideration that plaintiff would do certain work for the board at request of defendant, as and assuming to be agent of the board, defendant promised plaintiff that he was authorized by the board to make such request; that

plaintiff did the work accordingly, but defendant turned out not to be authorized, and plaintiff was unable to make the board pay.

Second count : Alleging defendant's promise to be that he would procure a contract from the board, whereby they should be bound to pay for the work.

Money counts: For work and labour, &c.

Count, added at the trial, alleging defendant's promise to be that, in consideration that plaintiff would do the work for the board, defendant promised to pay for the work, if the board should at any time refuse to pay.

Pleas to the money counts: Never indebted, and to the other counts, 1. That defendant did not promise as alleged, 2. That plaintiff did not do the work at defendant's request as alleged.

At the trial before Kelly, C.B., at the Devon Summer Assizes, 1870, the following facts were proved :—The defendant was chairman of the Brixham Local Board of Health. The plaintiff, a builder and contractor, was employed, in 1866, by the board to construct certain main sewage works in the town. On the 19th of March, 1866, notice was given by the board under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69, to the owners of certain houses to connect their house drains with the main sewer within twenty-one days. Before the expiration of the twenty-one days, Robert Adams, the surveyor of the board, proposed to the plaintiff that he should construct the connections between the house drains and the main sewer. The plaintiff said that he was willing to do the work if the board would see him paid. On the 5th of April, that is, before the expiration of the twenty-one days, the construction of the connections was commenced by the plaintiff.

The plaintiff stated in evidence that on the day on which the construction of the connections was commenced, and about an hour previous to the commencement, he was leaving Brixham with his carts and men, after the completion of the main sewer, when Adams stopped him, and requested him not to go away as there was more work to be done. The plaintiff asked who was to be responsible for the payment, and Adams said that the defendant was waiting to see the plaintiff about it. The plaintiff then had an interview with the defendant, at which the following conversation took place: The defendant said, "What objection have you

1871

MOUNT-
STEPHEN
v.
LAKEMAN.

1871

MOUNT-
STEPHEN
v.
LAKEMAN.

to making the connections?" Plaintiff said, "I have none; if you or the board will order the work or become responsible for the payment." The defendant replied, "Go on, Mountstephen, and do the work, and I will see you paid."

The plaintiff constructed and completed the connections in question in the months of April and May, 1866, under the general superintendence of the surveyor of the board; and the plaintiff, on the 5th of December, 1866, sent in an account to the board debiting them with the amount. The board disclaimed responsibility on the ground that they had never entered into any agreement with the plaintiff, nor by any resolution or order authorized any officer of the board to agree with him for the performance of the work in question.

The plaintiff, for the first time, on the 20th of November, 1869, through his solicitor, applied to the defendant for payment of the work, and the defendant having refused to pay him, commenced this action.

At the close of the plaintiff's case, the counsel for the defendant claimed a nonsuit on the ground that there was no evidence of any liability on the part of the defendant. The learned judge declined to nonsuit, stating his opinion there was evidence to support a count in the form above given, and which he gave the plaintiff leave to add.

The defendant's case was then entered upon, and the defendant denied that any conversation of the kind deposed to by the plaintiff had ever taken place.

The Chief Baron left it to the jury to say whether the conversation did take place; and the jury returned a verdict for the plaintiff for the amount claimed.

Leave was reserved to the defendant to move to enter a nonsuit, if it should appear that there was no evidence, either upon the original declaration or upon the declaration as amended, which ought to have been left to the jury.

The defendant obtained a rule accordingly, to enter a nonsuit, on the ground that there was no evidence of any original liability on the part of the defendant to the plaintiff for the work to be done; or for a new trial, on the ground that the verdict was against the evidence.

The Court of Queen's Bench afterwards made the rule absolute to enter a nonsuit, on the ground that the defendant's engagement did not amount to an undertaking to be primarily liable for the work; but only to a promise, that if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another within s. 4 of the Statute of Frauds, and not being in writing was void. (1)

The question for the Court of Appeal was, whether the defendant is entitled to have a nonsuit entered.

Nov. 28. *A. Charles (Lopes, Q.C., with him)*, for the plaintiff. The decision of the Court of Queen's Bench, making the rule absolute to enter a nonsuit, was erroneous. All that was left to the jury was, whether the conversation spoken to by the plaintiff took place or not: this they found in the affirmative; and therefore the question is, what was the contract which this conversation evidenced, coupled with the other circumstances of the case? There was ample evidence from which the jury might have found either an original liability in the defendant, in which case the plaintiff would be entitled to a verdict on the added count, or the money counts; or else there was evidence to sustain a verdict on the first and second counts. But the main argument in the court below proceeded on the question under the Statute of Frauds. The Court were wrong in holding such a promise to be within s. 4 of the Statute of Frauds. In order to make a contract a promise to be answerable for the debt, default, or miscarriage of another, there must be a debt, default, or miscarriage of a third person, for which that person has already or does thereafter become liable, and it is not sufficient, as the Court of Queen's Bench held, that the promiser and promisee both expect that by possibility a third party will eventually become liable. [On this point he cited the following authorities: Chitty on Contracts, 8th ed., p. 475; 2 Parsons on Contracts, p. 301; Brown on the Statute of Frauds, ss. 11, 155, 156 (2nd ed.); *Birkmyr v. Darnell* (2); *Read v. Nash* (3); *Kirkham v. Marter* (4); *Harris v. Huntbach* (5); *Har-*

1871

MOUNT-
STEPHEN
v.
LAKEMAN.

(1) Law Rep. 5 Q. B. 613.

(3) 1 Wils. 305.

(2) 1 Sm. L. C. 274 (6th ed.)

(4) 2 B. & A. 613.

(5) 1 Burr. 373.

1871
MOUNT-
STEPHEN
v.
LAKEMAN.

greaves v. Parsons (1); *Couturier v. Hastie* (2); *Cripps v. Hartnoll* (3); *Green v. Cresswell* (4); 1 *Williams' Notes to Saunders*, pp. 230-234; and *Goodman v. Chase* (5); but the judgment of the Court renders it unnecessary to do more than refer to them.] Secondly, the promise of the defendant, coupled with the surrounding circumstances, proved the first or second counts within the principle of *Collen v. Wright* (6), *Simons v. Patchett* (7), and *Cherry v. Colonial Bank of Australasia*. (8)

Nov. 29. *H. T. Cole, Q.C.* (*Pinder* with him), for the defendant. The contract to be deduced from the conversation, coupled with the position of all parties at the time, is, that the owners or occupiers of the houses were the parties to be primarily liable, and the promise of the defendant, "I will see you paid," amounted to no more than a guarantee: *Keate v. Temple*. (9) Why should the defendant make himself primarily liable? The conversation could only import what the judges in the court below said it did. [He cited notes to *Birkmyr v. Darnell* (10); Throop on Verbal Contracts, vol. i., cc. 7 and 8, pp. 214, 256; *Peckham v. Faria* (11).]

Charles, in reply. The supposed liability of the householders would put the contract of the defendant precisely on the same footing as the supposed liability of the local board, which was assumed by the Court of Queen's Bench; and the arguments already addressed to the latter state of facts, are equally applicable if the supposed liability be that of the householders; in either case it is not within the Statute of Frauds.

[WILLES, J. Suppose this to be put down in writing, but not signed by C.: "A. having ordered a house to be built by B., B. is desirous of having the security of some third person, and C. is willing to become surety for A., and requests B. to go on with the house accordingly." B. builds the house; but it turns out, when the house is built, that the order supposed by B. and C. to

(1) 13 M. & W. 561, 570.

(2) 8 Ex. 40; 22 L. J. (Ex.) 97.

(3) 4 B. & S. 414; 32 L. J. (Q.B.)

381. 8 *Im* *As* 1010

(4) 40 A. & E. 453.

(5) 1 B. & Ald. 297.

(10) 1 Sm. L. C. 274 (6th ed.)

(6) 8 E. & B. 647; 27 L. J. (Q.B.)

215. 4 *Im* *As* 358

(7) 7 E. & B. 568; 26 L. J. (Q.B.)

195. 3 *Im* *As* 742.

(8) Law Rep. 3 P. C. 24.

(9) 1 B. & P. 158.

(11) 3 Doug. 13.

have been given by A. was not by A., but by X., who had no authority from A., and, consequently, there was no liability of A. The contract would be void, independently of the Statute of Frauds, because C. never meant to become liable unless A. was primarily liable; both parties being mistaken, there is no contract at all.]

In the present case there was no such common error; both parties knew that neither the owners nor the local board had given any orders at the time the conversation between the plaintiff and defendant took place.

WILLES, J. [after going minutely through the facts of the case.] At the time the conversation took place it was known, both to the plaintiff and the defendant, that the owners were not liable, and had not interfered in the matter. The plaintiff did not doubt the responsibility of the board in respect of ability to pay, and he wanted no guarantee for this work any more than for the work which he had already done for the board; but he knew he had not got the order of the board, and so did the defendant, although the contrary seems to have been assumed by the Court of Queen's Bench. Therefore, it is pretty clear that the meaning of the conversation could not be that the defendant would guarantee payment by the board; but it might mean that he had, or would obtain, the order of the board, in which case the principle of *Collen v. Wright* (1) would apply, and the defendant might be liable on the first or second count. But it was competent to a jury to find,—and I need go no further than that, though I think it would have been the proper conclusion to draw,—that the meaning of the answer of the defendant was not “I will be liable as surety for the board, if they become liable to you,” making the contract one of suretyship; but “Whether the board be liable or not, do the work and you shall be paid;” that is, “I undertake to pay you for the work, unless you should happen to be paid either by the board or by the owners, assuming they come forward and pay, though they are not liable.” That appears to me to be the result of the conversation. It is a bargain, therefore, by the defendant to pay for the work, though it was known that there was no person liable at the time, and whether a third person should become liable in future or not,

1871

MOUNT-
STEPHEN
v.
LAKEMAN.

(1) 8 E. & B. 647; 27 L. J. (Q.B.) 215. *4 June 1853*

1871

MOUNT-
STEPHEN
v.
LAKEMAN.

that is, whether or not there was, or might be, a third person who could be liable for a debt, or guilty of a default or miscarriage in the matter. And it is only in respect of such a third person that the Statute of Frauds applies.

The leading case upon the application of the Statute of Frauds has generally been considered to be *Birkmyr v. Darnell* (1), and in the note to Mr. Evans's edition of Salkeld's Reports it is stated, that, "from all the authorities it appears, conformably to the doctrine in this case, that if the person for whose use the goods are furnished is liable at all, any other person's promise is void, except in writing." I think that may very well be modified: "Or if his liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the promise is void:" so as to include the case which I put to Mr. Charles of persons wrongly supposing that a third person was liable, and entering into a contract on that supposition. If, in such a case, it turned out that the third person was not liable at all, the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract. The *lex contractus* itself would make an end of the claim, and not the application of the Statute of Frauds, whether the contract was in writing or not, and whether signed or not. The law of contract gives you, as foundation, that a person was taken to be liable, and that the suretyship was a suretyship in respect of that liability. Take away the foundation of principal contract, the contract of suretyship would fail. Again, if there was a contract with reference to a liability, not existing at the time, by reason of the debt not being due at the time, but being payable in futuro, that would come under the word default, and there would be no difficulty about that. So, if there was a contract, "If A. B. will employ you to do work, I promise to become surety for him that he shall pay you;" in that case the promise would clearly come within the statute, because, although there was no liability existing at the time when the promise was made, there was a liability contemplated as the foundation for the promise of the defendant. It was a contract of suretyship in respect of a liability to be created; but if the liability were not created, there again the *lex contractus* would prevail. There would

(1) 1 Salk. 27.

be the condition precedent to the arising of any liability as surety, that there should be a principal debtor established. In all these cases, no doubt, one agrees thoroughly with what was laid down in the Court of Queen's Bench, because you have the case of principal debt contemplated by the parties, and suretyship founded in respect of that principal debt. But in order to bring the case within that rule, you must first of all shew that the parties did intend that there should be a principal debtor. In this case, seeing that the parties knew that the board was not liable, and that the plaintiff would not go on unless he had the board or the defendant liable, and did not care to have the defendant liable if the board was liable, the facts seem to exclude, and the jury might well find that they excluded, the notion of the defendant becoming surety for a liability, either past, present, or future, upon the part of the board; and they might look upon the defendant's contract as a contract to pay, whether the board have been, are, or shall be liable or not: "Do that work now, and you shall be paid for that work." So that it is a case of principal liability.

We were asked by Mr. Cole to look at a variety of points in this case, upon which he suggested that the true result ought to be a new trial, and not the discharging of the rule directing that a nonsuit should be entered; but the arguments upon that head appear to be excluded by the reservation at the trial, which was to enter a nonsuit, if it should appear that there was no evidence, either upon the original declaration or upon the declaration as amended, which ought to have been left to the jury; and the rule was to enter a nonsuit, on the ground that there was no evidence of an original liability on the part of the defendant. No objection was taken to the form in which the question was left. Moreover, the question for the opinion of the Court of Appeal is stated to be, whether or not the defendant is entitled to have a nonsuit entered; that is, whether, at the end of the plaintiff's case, the Lord Chief Baron would have been justified in directing that the plaintiff should be nonsuited.

I do not think it necessary to make any further remarks upon the judgment of the Court below. It is quite clear from the report, that the judgment is founded upon the notion of such a case as I put to Mr. Charles, namely, the notion that, upon the facts,

. 1871

MOUNT-
STEPHEN
v.
LAKEMAN.

1871
MOUNT-
STEPHEN
v.
LAKEMAN.

the parties must be taken to have supposed the existence of a principal contract with the board, or, taking Mr. Cole's view, with the owners, before there could be any contract arising with the defendant. It is a "supposed liability." The facts are such that the jury might have thought, as I apprehend, correctly, that it was a supposed non-liability of the board that led to what took place between the plaintiff and the defendant. In the judgment of Mr. Justice Blackburn, which I do not presume to criticise, except for the purpose of finding out, as I am bound to do, the reasons on which he proceeded, there is the passage: "We must now take it that the plaintiff, when he agreed to do the work, thought he had got the order of the board, but that he would not have done the work without, in addition to the order of the board through their chairman, the personal promise of the defendant himself that he would see him paid." I am not at all criticising the law as laid down there, except in so far as it conflicts with *Birkmyr v. Darnell* (1); but dealing with that judgment upon the question of fact, upon which it is founded, I humbly conceive that it assumes the fact differently from what it appears upon the case as laid before us. It assumes that the plaintiff thought he had the order of the board, whereas it appears upon the case that the plaintiff would not go on because he thought he had *not* got the order of the board. The result appears to be, that the jury might well, upon the evidence, have found an original liability in the defendant, a liability not falling within the provision of the Statute of Frauds. A nonsuit, therefore, could not have been sustained, and we are bound to reverse the judgment.

CHANNELL, B. I agree with my Brother Willes in thinking that the judgment of the Court of Queen's Bench must be reversed, and that the verdict must be entered for the plaintiff.

KEATING, J. I am of the same opinion. The simple question upon which I deliver an opinion is, that the evidence at the trial was such that the judge might have left to the jury the question, whether there was an undertaking by the defendant in the nature of a primary liability, or whether the defendant's undertaking amounted to a contract of suretyship only, such as would

(1) 1 Salk. 27.

require a writing under the Statute of Frauds. It appears to me, for the reasons already given by my Brother Willes in detail, that there was evidence which could not and ought not to have been withheld from the jury as evidence of a primary liability. The Court of Queen's Bench appear to have gone on the fact that there was no such evidence that ought to have been left to the jury, and held that the want of writing to satisfy the Statute of Frauds was fatal to the plaintiff's case.

1871

MOUNT-
STEPHEN
v.
LAKEMAN.

PIGOTT, B. I cannot say that I have not felt some hesitation in the course of the case, but in the result I have come to the conclusion that there was evidence which the Lord Chief Baron could not have withdrawn from the jury, whether the defendant did give an order and take upon himself a primary liability to pay for this work. The words, "I will see you paid," as it seems to me, may mean either one thing or the other. "I will see you paid," that is, "I will pay you," or, "You shall be paid." But I do not think these words are necessarily to be taken in the sense Mr. Cole contended for, as meaning, "I will see that somebody else pays you," or that "your principal debtor pays you; and if he does not, I will be the surety for payment." I do not think that phrase, "I will see you paid," has any hard and fast meaning of that kind; it must depend on the other facts of the case.

CLEASBY, B. I have come to the same conclusion. We are to give our judgment upon the case as stated on appeal. It is stated that the opinion of the jury was taken whether the plaintiff's version of the conversation was correct or not, and the jury must be taken to have found that it was. If that conversation did take place, then at the termination of the plaintiff's case, as has been pointed out by my Brother Willes, there was evidence to go to the jury of a primary liability on the part of the defendant. It is very unfortunate that a case should turn upon such a finding of the jury, whether particular words were made use of or not, four or five years ago. Nothing can be more unsatisfactory than attempting to decide the rights of parties upon the legal construction of language, referring to what took place so long ago, where everything may turn on the use of a particular word. But we cannot help

1871

MOUNT-
STEPHEN
v.
LAKEMAN.

that in this case, and we must take it that those expressions were made use of. Then what we have to deal with is this simple question: Does that conversation, coupled with the surrounding circumstances, warrant the conclusion that the defendant intended to make himself primarily liable, or liable only in the failure of somebody else who was the principal debtor?

It seems to me quite clear, from the statement in the case, that there was no question whatever about the employment by the occupiers. The plaintiff would have nothing to do with them. It is quite true, as Mr. Cole has said, that in one sense he wanted to be guaranteed against them; but in reality he would not take them as his employers at all, and therefore he wanted to be secure of payment, in case the work was done; and it seems to me that, at all events, the conversation amounted to evidence that the defendant either promised that the board should order the work, or "you may take it as my order, and I will see you paid;" and this was quite consistent with the plaintiff's conduct afterwards; because he took it as an assurance that the board would give the order, as the defendant was the chairman of the board. It is not necessary to refer to the authorities at all, because if the case has this complexion the authorities do not apply. I think that the conversation is quite capable of this construction, without going so far as to say that is the construction I should have put upon it. That being so, I think we must discharge the rule in the court below.

KELLY, C.B. [who had been absent during the argument]. Having tried this cause and read the case on appeal, I must say that I entirely concur with the judgment pronounced by this Court.

Judgment reversed.

Attorney for plaintiff: *G. E. Philbrick, for W. & C. Kitson, Torquay.*

Attorneys for defendants: *Church, Sons, & Clarke, for Francis & Baker, Newton Abbott.*

EX PARTE DRIFFIELD.

1871

Nov. 24.

County Coroner—Salary—23 & 24 Vict. c. 116, s. 4.

' Where the salary of a county coroner, holding office at the time of the passing of 23 & 24 Vict. c. 116, has once been fixed under that Act at not less than the average amount of the fees, mileage, and allowances received during five years before the 31st of December, 1859, and where the salary of such coroner is subsequently revised after a period of five years, the salary may be fixed at less than the average amount of the fees, mileage, and allowances which would have been received during the preceding five years.

MOTION for a mandamus directing the Secretary of State for the Home Department to revise and increase the salary of the coroner for the West Derby district of the county of Lancaster.

The applicant had been coroner for the West Derby district at the time of the passing of 23 & 24 Vict. c. 116. And under s. 4 of that Act, his salary had been fixed by the Home Secretary at an amount not less than the average amount of the fees, mileage, and allowances received by him in the five years preceding the 31st of December, 1859. Five years elapsed from the date at which his salary was so fixed; and he then applied to the justices of the county at quarter sessions to revise and increase his salary, regard being had to the number of inquests held by him in the last five years. Being dissatisfied with the decision of the justices, he appealed to the Home Secretary, who awarded to him a salary less than the average amount of the fees, mileage, and allowances which he would have received during the preceding five years.

Crompton, in support of the motion. (1) By s. 4 of 23 & 24 Vict. c. 116 (2), the salary of any county coroner, holding office at

(1) In the Bail Court before Cockburn, C.J., and Lush, J.

(2) By 23 & 24 Vict. c. 116, s. 4: "On and after the 1st of January, 1861, there shall be paid to every county coroner, in lieu of the fees, mileage, and allowances, which if this Act had not been passed he would have been entitled to receive, such an annual salary as shall be agreed upon between him and the justices in general or quarter

sessions assembled. . . . Such salary in the case of any person holding the office of county coroner at the time of the passing of this Act, not being less than the average amount of the fees, mileage, and allowances actually received by such coroner and his predecessors, if any, for the five years immediately preceding the 31st of December, 1859; Provided always, that in case any such justices and any such

1871

EX PARTE
DRIFFIELD.

the passing of the Act, was to be fixed at a sum not less than the average amount of his fees, mileage, and allowances for the five preceding years. And the revision provided for at the end of each successive period of five years is only to enable the salary to be readjusted, so as to correspond with what would have been the average of fees, mileage, and allowances, during those five years, had they been received by the coroner instead of salary.

THE COURT held that the matter was concluded by the decision of the Home Secretary, he having heard and determined the case. And there was no appeal from his decision.

The Court were asked to express an opinion upon the construction of the statute, as a guide to justices on future occasions. And their opinion was that, although, when the salary was fixed for the first time, the coroner was entitled to have it fixed at an amount "not being less than the average amount of the fees, mileage, and allowances actually received for the five years preceding the 31st of December, 1859," yet those words were not to be extended so as to govern the subsequent proviso relating to re-adjustment of the salary at the end of successive periods of five years; but that in such cases all the circumstances might be taken into account, and the amount fixed at less than the average of the fees, mileage, and allowances during the five years immediately preceding.

Rule refused.

Attorneys: *Wright & Venn.*

county coroner as aforesaid, shall be unable to agree as to the amount of the salary to be paid to such coroner; it shall be lawful for Her Majesty's principal Secretary of State for the Home Department, and he is required, upon the application of such coroner, to fix and determine the amount of such salary, having regard to such average as aforesaid, also the average number of inquests held by any such coroner in the preceding five years as aforesaid, and also to the special circumstances of

each case, and the general scale of salaries of county coroners; Provided also, that after the lapse of every successive period of five years it shall be lawful for any such justices and such coroner as aforesaid, to revise, and thereby increase or diminish, any such salary, having regard to the average number of inquests held by any such coroner in the five years immediately preceding, and subject in case of their disagreement to such appeal to the Home Secretary as before mentioned."

EX PARTE MOLESWORTH.

1871

Nov. 25.

Municipal Corporation—Town Councillor—Disqualification—Assessor to revise Burgess List—5 & 6 Wm. 4, c. 76, s. 37—7 Wm. 4 & 1 Vict. c. 78, ss. 4, 15.

The 7 Wm. 4 & 1 Vict. c. 78, s. 15, by which no burgess is eligible to be elected a member of the council of a borough while holding the office of assessor, applies only to assessors elected under 5 & 6 Wm. 4, c. 76, s. 37, and does not apply to an assessor for revising the burgess list appointed under 7 Wm. 4 & 1 Vict. c. 78, s. 4.

MOTION on behalf of George Molesworth and Henry Allen, burgesses of the city of Chichester, for an information in the nature of a quo warranto, calling upon James Adams to shew by what right he exercised the office of councillor of the city of Chichester.

The city of Chichester is divided into two wards, the north ward and the south ward. On the 1st March, 1871, James Adams and Edmund Peachey were elected assessors to revise the burgess list; and on the 5th October, in the same year, they, as such assessors, revised the list with the mayor. On the 1st November, 1871, they were elected town councillors for the south ward; George Molesworth and Henry Allen were unsuccessful candidates at the same election, being next in number of votes to Adams and Peachey. On the 31st October, public notice had been given that Adams and Peachey were disqualified, being assessors to revise the burgess list; but they were declared duly elected.

Pollock, Q.C. (H. T. Atkinson with him), in support of the motion. (1) The Municipal Corporation Act (5 & 6 Wm. 4, c. 76), s. 37 (2), provides for the election, on the 1st March in each year, of two assessors for the borough, who, by s. 18, are with the mayor to revise the burgess list. Where, however, the borough is divided into wards, by s. 43 of the same Act, two assessors are to be elected for each ward. And by the same section it was provided that in

(1) In the Bail Court, before Lush and Hannen, JJ.

(2) By 5 & 6 Wm. 4, c. 76, s. 37, "On the 1st March, 1836, and in every succeeding year, the burgesses of every borough shall elect, from the persons qualified to be councillors, by a major-

rity of votes . . . two burgesses who shall be, and be called assessors of such borough." . . . "Provided, also, that no burgess shall be eligible to be or to be elected . . . such assessor as aforesaid who shall be of the council."

1871

EX PARTE
MOLESWORTH.

such a case the assessors of the mayor's ward were to be the assessors to revise the burgess list with the mayor. This last provision is repealed by 7 Wm. 4 & 1 Vict. c. 78, s. 4; and it is there enacted that, in every borough divided into wards, two assessors to revise the burgess list shall be elected. (1) Then follows s. 15 (2), by which it is enacted in the most general terms that no assessor shall be eligible for the office of councillor. Both kinds of assessors must have been present to the minds of the framers of the statute, for s. 4 created the assessors to revise the list; and this appears also from s. 17, in which both kinds are referred to, and empowered to appoint deputies. The mischief of any other construction would be very great, for an assessor might be elected in November upon a list revised by himself in October.

Sir John Karlake, Q.C., and A. L. Smith, shewed cause in the first instance. The persons whose election is objected to were not assessors of the borough elected under 5 & 6 Wm. 4, c. 76, s. 37; but only assessors to revise the burgess list under 7 Wm. 4 & 1 Vict. c. 78, s. 4. These two classes of assessors are wholly distinct. The borough assessors continue in office from the 1st of March to the 1st of March: 5 & 6 Wm. 4, c. 76, s. 37. They have, in November, to preside at the annual elections (s. 32); and even after that, in case of a vacancy between November and the 1st March. The assessors to revise the burgess list are merely appointed to do one

(1) By 7 Wm. 4 & 1 Vict. c. 78, s. 4: "Whereas, by the said Act [5 & 6 Wm. 4, c. 76] it is provided that in every case in which there shall be a division into wards of any borough, the assessors who shall hold the court for revising the burgess list with the mayor, shall be the assessors of the mayor's ward; and it may be, in case the mayor be chosen from among the aldermen, that there is no mayor's ward in such borough; be it enacted, that so much of the said Act as provides that the assessors who shall hold the court for revising the burgess list with the mayor shall be the assessors of the mayor's ward, is hereby repealed; and in every borough divided into wards, two assessors shall be chosen on the twenty-first

day after the passing of this Act, and in every subsequent year on the 1st March, or on the following day if that day be on a Sunday, to hold the court for revising the burgess list with the mayor in like manner as is provided in the said Act concerning the election of two auditors of such borough."

(2) By 7 Wm. 4 & 1 Vict. c. 78, s. 15: "Whereas, by the said Act for regulating corporations [5 & 6 Wm. 4, c. 76] it is provided that no burgess shall be eligible to be, or to be elected, an . . . assessor, who shall be of the council; be it also enacted, that no burgess shall be eligible to be elected a member of the council while holding the office of assessor . . ."

single duty, formerly, by 5 & 6 Wm. 4, c. 76, s. 43, discharged in a borough divided into wards by the assessors of the mayor's ward, namely, to revise the burgess list. They are not appointed for any fixed time. Their duties must be completed before the 15th October; and they are then *functi officio*. The persons whose election is now complained of were, therefore, not in office at all when the election took place in November. But even if they were, s. 15 of 7 Wm. 4 & 1 Vict. c. 78 does not apply to them. It must be read with the proviso in 5 & 6 Wm. 4, c. 76, s. 37, which it recites. That proviso disqualified councillors from being elected assessors; but it omitted to say that an assessor should not be elected a councillor. Sect. 15 merely supplies that omission. And it applies to the same class of assessors, assessors to the borough. *Reg. v. Weymouth* (1) was referred to.

Pollock, Q C., replied.

LUSH, J. I have come to the conclusion that the persons against whom this rule has been moved are not disqualified. But the case is not, to my mind, so clear that I should have refused to allow the writ to issue if we had been pressed to do so. The case depends upon the construction of s. 15 of 7 Wm. 4 & 1 Vict. c. 78. And that section can only be understood by looking to s. 37 of 5 & 6 Wm. 4, c. 76. By that section it is enacted that, "on the 1st of March, 1836, and in every succeeding year, the burgesses of every borough shall elect, from the persons qualified to be councillors, by a majority of votes, two burgesses who shall be and be called assessors of such borough." And at the close of the section is the proviso that, "no burgess shall be eligible to be or to be elected such assessor, as aforesaid, who shall be of the council."

Now, the assessors mentioned in that section are assessors for the whole borough, elected on the 1st of March in each year, and continuing in office till the 1st of March in the next year, whose duties consist not merely in revising the list, but also, by ss. 30 and 32, in presiding with the mayor at the election of councillors on the 1st of November; and the proviso in this section speaks expressly of "such assessor as aforesaid." Further on in the Act, s. 43, provision is made for the election of assessors for the ward in the case

1871

EX PARTE
MOLESWORTH.

of a borough divided into wards; and it was enacted that in such a case the assessors of the mayor's ward should be the assessors to revise the burgess list. Sect. 4 of 7 Wm. 4 & 1 Vict. c. 78, repealed so much of the last-mentioned section as directed that the assessors of the mayor's ward should be the assessors to revise the list; and provided for the election of two assessors to revise the list. These assessors are of a different character from the assessors of the borough elected under the older Act. It is not said how long they are to remain in office, and their sole duty is to revise the list. Then we come to s. 15, upon which the whole question turns. Sect. 37 of the older Act only disqualified a councillor from being elected assessor. It did not disqualify an assessor from being elected councillor. Sect. 15 of the second Act was, I think, intended to supplement that. The proviso in the older section only applied to "such assessors as aforesaid," that is, assessors of the borough. The later section recites that proviso and goes on, "Be it also enacted that no burgess shall be eligible to be elected a member of the council while holding the office of assessor." Reading that with the earlier proviso, assessor must be read as "such assessor." It applies, therefore, not to the assessors for revising the list, but only to the assessors for the borough. Sect. 17 fortifies this view, for when intending to include both kinds of assessors it uses in the first instance the words "every assessor," and then expressly points to the two classes of assessors. It may be said that in s. 4 the second class of assessors, those to revise the list, had been expressly provided for, and that the words of s. 15 are general. That is an argument not without weight. But looking at s. 15 together with the older Act, I think it was only intended to supplement the proviso in s. 37 of that Act.

HANNEN, J. I am of the same opinion. I think s. 15 of 7 Wm. 4 and 1 Vict. c. 78, can only have been intended to supplement the proviso in s. 37 of 5 & 6 Wm. 4, c. 76. The wording is very peculiar. It first recites the proviso in the earlier section, and then goes on, "be it also enacted." It was clearly intended to supply what that proviso had left incomplete; and "assessor" must be read "such assessor." I should have been the less disposed to come to this conclusion, had it not been that the suggested mischief, namely,

that an assessor may be elected councillor by a list of burgesses of his own revising, might still occur in many cases, whichever way we decided this case. It is not therefore a mischief which the legislature thought it necessary to guard against.

1871

EX PARTE
MOLESWORTH.*Rule refused.*Attorney for Molesworth: *Henry Sowton.*Attorneys for the corporation: *Robinson & Preston.*

END OF MICHAELMAS TERM, 1871.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXV VICTORIA.

1872

SIMPSON, APPELLANT; WELLS, RESPONDENT.

Jan. 21.

Custom—Statute Sessions or Fairs—Custom, to erect Stalls at Statute Sessions for hiring Servants, bad—Claim of Right.

Appellant was charged under 5 & 6 Wm. 4, c. 50, s. 72, with obstructing a public footway. He had put up a stall for the sale of refreshments at a statute sessions for the hiring of servants; this had been done for more than fifty years, and the statute sessions had been held before 5 Eliz. c. 4. Appellant, thereupon, contended that he had a right by custom to erect his stall in the same way as at a fair, or, at all events, that he bona fide claimed such a right, and the justices' jurisdiction was therefore ousted. The justices having convicted appellant:—

Held, that the justices were right: for that, as the statute sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edw. III., there could be no such custom by immemorial usage as was claimed.

CASE stated by Justices of the parts of Lindsey, in the county of Lincoln, under 20 & 21 Vict. c. 43.

An information was preferred by the respondent, superintendent of police, against the appellant, under s. 72 of 5 & 6 Wm. 4, c. 50,

that the appellant did unlawfully and wilfully obstruct the free passage of a certain public footway, by placing a stall thereon, contrary to the statute.

1872

SIMPSON
v.
WELLS.

Upon the hearing it was proved that on the 9th of May, 1871, the appellant had erected a stall on the public footpath by the side of the public carriageway, in the parish of Winterton, upon which he had ginger beer, biscuits, and other kinds of confectionery for the purpose of sale to the servants attending the statute. The top of the stall projected about three feet over the footpath, and the path was obstructed by the tressels on which the stall stood, and also by the top of the stall, which projected over it, so that passengers on the footpath were unable to pass along freely.

The day on which the obstruction took place was the day of holding the annual statute sessions at Winterton, for hiring servants, and a large number of persons were assembled. The day for holding such statute sessions was formerly fixed by the chief constable, and, since the office of chief constable was abolished, the local board for the parish of Winterton have fixed the day on which the statute sessions is annually held. The statute sessions for hiring servants is of great antiquity, and was accustomed to be held when the 5 Eliz. c. 4 was passed (see s. 48).

On the part of the appellant, it was contended that the statute sessions was a fair; and it was proved that it had been regularly held at Winterton for more than twenty years; and that during that period stalls had been erected on the footpaths on the statute or fair day without interruption; and that that was a sufficient answer to the information for obstructing the footpath; and the cases of *Rex v. Smith* (1) and *Elwood v. Bullock* (2) were cited. It was also objected on the part of the appellant, that as he claimed a bonâ fide right to do the act complained of, the jurisdiction of the justices was ousted, and *Rex v. Cross* (3) and *Rex v. Ward* (4) were cited.

The justices were of opinion that the statute sessions was not a fair as contended by the appellant, and that no bonâ fide claim of right had been shewn on his part, and overruled the objections.

(1) 4 Esp. 109.

(3) 3 Camp. 224.

(2) 6 Q. B. 383.

(4) 4 A. & E. at p. 405.

1872
 SIMPSON
 v.
 WELLS.

The appellant then called witnesses who proved that the statute sessions had been held at Winterton regularly for nearly fifty years; that at such statute sessions it has been the custom to have stalls on the highway; that the appellant's stall had been fixed where it stood by the authority of two persons appointed by the Winterton local board to arrange the stalls as well as they could for the convenience of the public.

The respondent contended that even if there were a custom to erect a stall on the highway on the Winterton statute day, such custom was not good, unless sufficient space was left for the public to pass, and cited *Gerring v. Barfield*. (1)

The justices were of opinion that the statute sessions was not a fair or market within the cases cited for the appellant, and that the stall erected by the appellant on the footpath was an obstruction to the highway, 'within the meaning of the Highway Act (5 & 6 Wm. 4, c. 50) s. 72, and convicted the appellant.

The questions for the Court were whether the claim made by the appellant was sufficient to oust the jurisdiction of the justices; if not, whether the conviction was legally and properly made.

Jan. 22. *Cave*, for the appellant, urged the same arguments, and cited the same cases as were urged and cited before the justices.

The respondent did not appear.

Cur. adv. vult.

Jan. 24. BLACKBURN, J. This case came a day or two ago before my Brother Lush and myself; we are of opinion that the conviction must be affirmed. [The learned Judge stated the facts.] It was contended before the magistrates, on the part of the appellant, that they ought not to convict him, for two reasons: first, that the facts established a good custom to set up stalls at these statute sessions; and, secondly, if the custom were not established, that at least there was enough appearance of claim of right to oust the magistrates' jurisdiction, and cause them to hold their hands. We, however, think neither of these grounds was tenable. The case of *Elwood v. Bullock* (2) was the chief case

(1) 13 C. B. (N.S.) 597.

(2) 6 Q. B. 383.

relied upon on behalf of the appellant; in which it was held that, at a fair for the sale of commodities, the immemorial custom claimed to erect stalls upon the highway, leaving sufficient room for passage, was good. But we think the magistrates properly drew the distinction between the case of a fair and the statute sessions, which are neither a market nor fair. The origin of statute sessions is derived from the Statutes of Labourers, the first of which was passed in the reign of Edward III.; there were several statutes in the same reign; several, too, in the reign of Richard II.; and several in subsequent reigns; and, finally, there was a statute in the reign of Elizabeth. (1) These statutes either regulated the rate of wages of labourers, or gave the justices power to do so by proclamation, and imposed penalties on anybody who either took or gave higher wages. The statute of 5 Eliz. c. 4, is the last statute on the subject, and it repealed, by ss. 1 and 2, all the previous statutes; but there was a proviso, in s. 48, "that it shall be lawful for the high constables in every shire to hold and continue petty sessions, otherwise called statute sessions, in all shires wherein such sessions have been used to be kept, in such manner as theretofore accustomed, so as nothing be done therein contrary to this present Act." The origin, therefore, of these statute fairs, as they are sometimes called, was that, when the proclamations at the sessions were to be made, both masters and labourers were in the habit of attending to hear what the rates of hiring were to be, and to make bargains for hiring for the ensuing term; and this, doubtless, would collect a large concourse of persons. But these meetings were not from time immemorial; and there is no more reason for saying it is a legal custom to put up stalls for refreshments on the highway at these meetings than at the assizes or quarter sessions, which usually cause an assemblage of people. Therefore there could not be such a custom, as there could not be

1872

 SIMPSON
v.
WELLS.

(1) The first Statute of Labourers is 23 Edw. 3, which was further enforced by 25 Edw. 3, st. 1, and these statutes were confirmed by 34 Edw. 3, c. 9, 42 Edw. 3, c. 6, and 2 Ric. 2, st. 1, c. 8. 12 Ric. 2, c. 4, again regulated wages. 13 Ric. 2, st. 1, c. 8, first gave power to the

justices to fix, and make proclamation at the sessions in Easter and Michaelmas of, the rate of wages to be taken between those sessions. There were several subsequent statutes on the same subject, which are all repealed by 5 Eliz. c. 4, ss. 1, 2.

1872

SIMPSON
v.
WELLS.

any legal origin of it; and consequently there could be no claim of right, and the justices were right in overruling the objections, and convicting the appellant.

Judgment for the respondent.

Attorneys for appellant: *Scott & Co.*

Jan. 15.

JONES AND WIFE v. CUTHBERTSON.

Parties to Action—Husband and Wife—Money had and received to use of the Husband and Wife—Money borrowed for Wife's separate use.

A married woman had property, freehold and leasehold, devised to her separate use, and she being desirous of building and repairing some cottages upon it, and her husband wishing to pay off a debt, it was arranged, under the advice of the defendant, a solicitor, that a loan of 550*l.* should be raised by the mortgage of the wife's property, and the deposit of two policies of 500*l.* each on the life of the husband and wife respectively. The mortgage was executed by husband and wife, and the husband covenanted for the repayment of the loan. The money was to be advanced by instalments, and a joint authority, signed by husband and wife, was given to the defendant to receive the first instalment of 150*l.* from the mortgagees. He received it, and paid the husband's debt by the authority of husband and wife, and he handed a small sum to them, but claimed to retain the balance for a previous debt due from the husband for professional services. Upon this an action was brought by husband and wife to recover the balance:—

Held, that the action was maintainable: for that the defendant, having full knowledge of the objects of the loan, one of which was to appropriate a sum to the separate use of the wife, received the money under the joint authority, as agent of the husband and wife to carry into effect those objects; and he could not, against their will, treat the transaction as a reduction into possession by the husband; and the defendant, therefore, had no right to set up as an answer to the action that the money, when in his hands, was money of the husband alone.

affirmed in each 22 Q.B. 504

DECLARATION by Thomas Jones and Rhoda Celia his wife, for money had and received by defendant to the use of plaintiffs, in right of the wife alone, she being then and still entitled to the same for her sole and separate use, and for the recovery of which she had a right to sue defendant.

Pleas: Never indebted, and payment.

Issue joined.

At the trial before Mellor, J., at the Glamorganshire Spring Assizes, 1871, a nonsuit was entered by consent, with leave to move

to enter a verdict for the plaintiffs for 70*l.* 8*s.* 7*d.*, the amount claimed.

1872

JONES

v.

CUTHBERTSON.

The facts are fully stated in the judgment of the Court.

A rule was obtained accordingly, on the ground that, under the circumstances proved at the trial, the action might be brought by the husband and wife jointly.

1871. Nov. 20. *J. W. Bowen* and *G. B. Hughes* shewed cause. The case comes within the rule laid down in 1 Roper's Husband and Wife, p. 220, 2nd ed., adopted in 1 Williams' Executors, pp. 803-4, 6th ed., that when money owing to the wife has been actually received under the authority of the husband, or the joint authority of husband and wife, as in the present case, the wife's interest in the property is changed, and there is a reduction into possession by the husband of the wife's chose in action, divested of her title to it upon surviving him; and he may maintain an action for the money so received. There are many cases which fully bear this out: *Huntley v. Griffith* (1); *Tugman v. Hopkins* (2); *Bird v. Peagram*. (3) The fact that the husband expressly authorized the receipt of the money, at once distinguishes this case from the late case of *Fleet v. Perrins* (4), where the husband was in entire ignorance of the fund in question. *Abbot v. Blofield* (5), *King v. Basingham* (6), and *Bidgood v. Way* (7), shew that money had and received cannot be maintained by husband and wife.

[LUSH, J. In *Bidgood v. Way* (7) and the other cases the wife's interest was not shewn. Suppose a promissory note given to husband and wife, the action may be brought by the two.]

The wife's rights may, perhaps, be sustained in equity: *Sloper v. Cottrell* (8); but she has no rights at law. The true effect of the whole transaction was, that the husband borrowed the money, the wife consenting that her separate property should be encumbered as security. She therefore was simply surety, and at law the money, when received, was the husband's alone.

(1) Moore, 452.

(5) Cro. Jac. 644.

(2) 4 M. & G. 389.

(6) 8 Mod. 199.

(3) 13 C. B. 639; 22 L. J. (C.P.)

(7) 2 W. Bl. 1236.

166. *17 M. 577.*

(8) 6 E. & B. 497; 26 L. J.

(4) Law Rep. 3 Q. B. 536; Law Rep.

(Q.B.) 7.

4 Q. B. 500.

1872

JONES
v.
CUTHBERTSON.

H. S. Giffard, Q.C., and *B. Francis Williams*, in support of the rule. The points of law relied on for the defendant may be conceded, but they do not apply to the facts of this case. The money was received, no doubt, under a joint authority from husband and wife; but that is not all. The circumstances under which the money was borrowed, and the fact that the defendant was acting throughout as solicitor for the plaintiffs, with full knowledge of the objects for which the money was borrowed, at once distinguish this case from cases that have been or can be cited. The question is, whether a husband cannot assent to his wife's having an interest in personalty: *Philliskirk v. Pluckwell* (1) is a direct authority that he may do so if he chooses. The defendant, knowing, when he received this money, that it was borrowed with the express object of being applied to the wife's separate estate, he cannot be heard to say that he received it, not for the wife's use, but to the use of the husband alone. In *Fleet v. Perrins* (2), in the Exchequer Chamber, even Kelly, C.B., who differed from the rest of the Court as to the form of action, on the ground that money had and received would not lie by husband and wife, did not deny that an action might be maintained in some form or other by the wife's representatives.

Cur. adv. vult.

Jan. 15. The judgment of the Court (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.) was delivered by

MELLOR, J. In this case Thomas Jones and Rhoda Celia, his wife, sued the defendant, who was an attorney and solicitor, to recover a sum of 70*l.* 8*s.* 7*d.*, received by him under the following circumstances.

The plaintiff Rhoda Celia Jones, having married the other plaintiff, Thomas Jones, in the lifetime of her father, became, on the death of the latter, devisee and legatee, under his will, of certain freehold and leasehold property, in Neath and Swansea, "to her separate use." The husband was indebted to Messrs. Franklyn and other persons, and he desired to obtain money to pay Franklyn's debt, while the wife wanted money to build or repair certain cottages on property which was included in the

(1) 2 M. & S. 393.

(2) Law Rep. 4 Q. B., at p. 516.

devise to her contained in her father's will. The defendant was their solicitor, and they, by the advice of his managing clerk, entered into a negotiation with some persons at Bristol, called the "Union Finance Company," for an advance of 550*l.* on the mortgage of the wife's separate property, and also upon two policies of insurance for 500*l.* each, one being a policy on the life of the wife, the other on the life of her husband. Both husband and wife executed the mortgage, and the husband entered into the usual covenants for the repayment of the loan to the mortgagees. It was part of the arrangement that the 550*l.*, agreed to be lent by the mortgagees on the above security, should be advanced by instalments, the first instalment being a sum of 150*l.* When that instalment became due, an authority in writing was prepared by the defendant's clerk, dated the 1st of July, 1870, and signed by the two plaintiffs, being a joint authority by them to the defendant to receive the money for them. (1) The defendant, accordingly, by virtue of that authority, received the first instalment, less the costs of the mortgagees' solicitors. He paid out of that instalment, by virtue of a written authority, signed by the husband and wife, a sum of 28*l.* 4*s.* 10*d.*, being the debt due by the husband to Messrs. Franklyn, and sent to the plaintiffs a cheque for 28*l.* 19*s.* 5*d.*, payable to the order of Thomas Jones, accompanied by a receipt for 139*l.* 17*s.*, being the amount of the first instalment, less the costs of the solicitors of the mortgagees, and retained the balance in his hands in satisfaction of a debt due to him from the husband in respect of professional charges for business before done. (2)

The defendant having refused to pay over the balance to the plaintiffs, this action was brought; and on the trial, these facts

(1) The authority was in these terms: "We, the undersigned, do hereby authorize you to receive of and from the Union Finance Company, Limited, Bristol, or their solicitors, the sum of 150*l.* (less solicitor's charges), being the first instalment on account of loan of 550*l.* which the said company have agreed to lend us on the security of property, situate in Neath and Swansea, Glamorganshire, and for so

doing this shall be your authority.

"Thomas Jones.

"Rhoda Celia Jones.

"1st July, 1870.

"To Mr. H. Cuthbertson, Solicitor,
"Neath."

(2) The plaintiffs in their particulars of demand gave credit to the defendant for a further sum of 12*l.* 4*s.* 2*d.*, for his costs, leaving a balance of 70*l.* 8*s.* 7*d.*, the sum they claimed.

1872
— JONES —
v.
CUTHBERTSON.

84 B 50

1872
JONES
v.
CUTHBERTSON.

appearing, it was contended for the defendant that the plaintiffs could not recover, inasmuch as, under the circumstances, the instalment, when received by the defendant under the joint authority to receive it, became, in point of law, the money of the husband only, and could only be sued for by him; in which case the defendant would have been able to set off the debt due to him from the plaintiff Thomas Jones. It was thereupon arranged, with the consent of the counsel on both sides, that the plaintiffs should be nonsuited, and that leave should be reserved to enter a verdict for 70*l.* 8*s.* 7*d.*, in the event of this Court being of opinion that they were entitled to recover in this action.

The case was argued in Michaelmas Term last, and the Court took time to consider its judgment. Many cases were cited on the argument in support of the general proposition stated in Bright's Law of Husband and Wife (vol. i., p. 53, c. 5, s. 2, par. 1), founded upon Roper's treatise on the same subject, viz., that "if the husband receives the fund which was owing to his wife, or if he, or he and his wife, authorize a person to receive it, who actually obtains it, either of such modes of receipt will change the wife's interest in the property, and will be a reduction of the chose in action into the possession of her husband, divested of her title to it upon surviving him; and he may maintain an action for the money so received by the person authorized." (1)

We do not doubt that the above passage contains a correct statement of the law, as applicable to the precise conditions specified in it; but it appears to us that the peculiar circumstances of the present case take it out of the operation of that rule, and distinguish it from the numerous authorities which were cited on the argument.

This is not, as was contended, a lending by the wife of the security of her separate estate for the benefit of her husband; but the effect of the transaction, as detailed in the evidence of the wife and her husband, was in substance this, viz., that the husband desired to discharge a debt due from him to Messrs. Franklyn, and that the wife desired to raise money for her own separate use, partly to repair and partly to build some cottages on her separate estate; and accordingly they, under the advice of the

(1) See Roper on Husband and Wife, vol. i. p. 220, 2nd ed

defendant's clerk, became parties to the arrangement, which was carried into effect by the mortgage; but it was not understood, or intended, either by the husband or the wife, that the money was to be raised for any other purpose than to provide means, as to part, to pay the debt due from the husband to Messrs. Franklyn, and, as to the residue, to be appropriated to the separate use of the wife. The defendant was well aware of all this, as the transaction was carried into effect through the instrumentality of himself and his clerk. When, therefore, the husband and wife signed the joint authority to the defendant to receive the first instalment, he was well aware that, with the exception of the debt to Messrs. Franklyn, the residue of the money was to be applied solely for the benefit of the wife, and he became the agent of both the plaintiffs to carry that purpose into effect. The money, therefore, when received by him, was received simply as agent for the husband and wife, to carry into effect their several objects, and he could not, against the will of the parties, treat the transaction as a reduction into possession by the husband, on his own account, and for his own purposes; and he had no right, therefore, to set up, as an answer to the present action, that the money, when it got into his hands, was the money of the husband only.

It was argued on the part of the defendant, that the true effect of the facts was that, the wife having agreed to incumber her separate estate, and the husband having deposited a policy of assurance on his own life, and entered into a covenant with the mortgagees to repay to them the entire amount of the sum secured, whereby he became primarily liable to the mortgagees, the wife stood in the nature of a surety only; and that under these circumstances the instalment, so soon as it got into the hands of the defendant, became immediately, in point of law, the money of the husband. If indeed the money had been raised for the husband's benefit only, and the wife had merely incumbered her separate estate in order to enable him to raise the money, the contention on the part of the defendant would have been justified, and the money then would have been received by the defendant discharged of any trust for the separate benefit of the wife, and it would have been in his hands the money of the husband only.

In equity it is well settled that a wife, entitled to property de-

1872

JONES
v.

CUTHBERTSON.

8QB514

1872
JONES
v.
CUTHBERTSON.

vised or bequeathed to her separate use, is considered as a feme sole as to all dealings with such property; and, although at law, she is in general incapable of contracting with her husband, still, in relation to transactions affecting her separate estate, there appears to be no doubt that she may enter into arrangements with her husband, or with other parties, for creating incumbrances or for making any other disposition of that estate, and designating the amount or the terms on which she may be disposed to join in a security like that which was given in the present case.

12
If the transaction takes the form of raising a loan for her husband, she is in equity treated as a surety to the extent to which she incumbers her separate estate, and is entitled to be reimbursed out of his estate; but if the transaction is one wholly or partially for her own separate use and benefit, there can be no reason why she should not enter into stipulations with her husband relating thereto; and we think that this was the effect of the transaction in question, and that the defendant, when he received the money by virtue of the joint authority of husband and wife, could not, contrary to the agreement and intention of the parties, treat the money so received as the money of the husband alone. The receipt by him could not, under the circumstances, operate as a reduction into possession by the husband, and was not, indeed, in the sense used in the authorities, a chose in action of the wife which the husband could by any act of his own reduce into possession.

It is unnecessary to refer to the numerous cases which were cited on this argument, inasmuch as none of them depend upon circumstances at all analogous to the present case.

Our judgment will therefore be, that the verdict be entered for the plaintiffs, pursuant to the leave reserved, for the sum of 70*l.* 8*s.* 7*d.*

Rule absolute.

Attorneys for plaintiffs: *Bell, Brodrick, & Grey.*

Attorney for defendant: *E. Peacopp.*

[IN THE EXCHEQUER CHAMBER.]

1872

Feb. 16.

NOTARA AND ANOTHER v. HENDERSON AND OTHERS.

Ship and Shipping—Duty of Master or Shipowner as to Goods damaged on the Voyage by excepted Perils—Duty to unload dry and re-ship Cargo—Measure of Damages.

There is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, where reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading. And for neglect of this duty by the master the shipowner is responsible to the shipper.

The plaintiffs shipped beans on board the defendants' ship, under a bill of lading, from Alexandria to Glasgow, with leave to call at intermediate ports, deliverable to plaintiffs' order on payment of freight by consignees. The ship called at Liverpool, and in going out met with a collision (a peril excepted in the bill of lading), and was obliged to put back for repairs, which detained her a few days. The beans were wetted by sea water in consequence of the collision; and the plaintiffs, being at Liverpool, offered to receive them there, paying freight pro rata; but the defendants' agent refused to deliver them without being paid full freight; and the beans were carried on to Glasgow; and on their arrival there they were much deteriorated in value, beyond what they would have been by the mere wetting from the collision, if they had been dried instead of being carried on as they were. The beans might have been removed at Liverpool from the ship to warehouses and spread out and dried, and there was warehouse accommodation within half a mile of the dock in which the ship was; and by this means the decomposition would have been materially arrested or mitigated. The cost of unshipping, drying, and re-shipping, would have been particular average, payable by the shippers. The plaintiffs brought an action against the defendants, claiming the amount of the extra depreciation. On a case disclosing the above facts, the Court having power to draw inferences:—

Held (affirming the judgment of the Court of Queen's Bench), that the facts shewed that the beans might have been taken out and dried (which was clearly a proper thing to do on behalf of the owners), and then re-shipped, without unreasonably delaying the whole adventure; that it was, therefore, the master's duty to have done so, and consequently the defendants were liable.

Seemle, that the measure of damages was the amount of extra depreciation in value in consequence of the neglect to dry the beans, after allowing the estimated expense of unshipping, drying, and re-shipping.

ERROR on the judgment of the Court of Queen's Bench in favour of the plaintiffs on a special case.

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4d.235-7
1CPD.20
1QBD.372
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1872

NOTARA
v.

HENDERSON.

The case is stated at length in the report in the Court below. (1) The facts fully appear in the judgment.

1871. June 13. *Field, Q.C. (C. Hutton with him)*, for the defendants.

Milward, Q.C. (Dicey with him) for the plaintiffs.

The arguments sufficiently appear from the judgment of the Court.

The following cases were cited for the defendants: *The Gratitude* (2); *Tronson v. Dent* (3); *Worms v. Storey* (4); *Blasco v. Fletcher* (5); *Jordan v. Warren Insurance Co.* (6); *Charleston Steamboat Co. v. Bason* (7); *Soule v. Rodocanachi* (8); *Ewbank v. Nutting* (9); *Palmer v. Lorillard* (10); *King v. Shepherd* (11); *Laveroni v. Drury*. (12)

For the plaintiffs were cited: *Bird v. Cromwell* (13); *Steamboat Lynx v. King* (14); *Niagara v. Cordes*. (15)

Cur. adv. vult.

Feb. 16. The judgment of the Court (Kelly, C.B., Martin, Channell, and Cleasby, BB., Willes, Byles, and Keating, JJ.) was delivered by

WILLES, J. This is an action by the shippers of beans on board a steamship called the *Trojan*, for a voyage from Alexandria to Glasgow, against the shipowners, for an alleged neglect of the master to take reasonable care of the beans by drying them at Liverpool, into which port the vessel was driven for repairs, by an accident of the sea, from the direct and proximate effect of which the beans were wetted; and from the remote effects of which, for want of drying, they were further seriously damaged.

The bill of lading was subject, amongst other exceptions, to the following, viz., "loss or damage arising from collision or other

(1) Law Rep. 5 Q. B. 346.

(2) 3 Rob. Adm. 240, 259.

(3) 8 Moo. P. C. 419, 449.

(4) 11 Ex. 427; 25 L. J. (Ex.) 1.

(5) 14 C. B. (N.S.) 147; 32 L. J. (C.P.) 284. *9th MS. 1105.*

(6) 1 Story, U. S. R. 342.

(7) Harper, 262.

(8) 1 Newberry, Adm. R. 504.

(9) 7 C. B. 797.

(10) 16 Johns. U. S. R. 348.

(11) 3 Story, U. S. R. 349.

(12) 8 Ex. 166; 22 L. J. (Ex.) 2.

(13) 1 Misso. 81.

(14) 12 Misso. 272.

(15) 21 Howard, U.S. R. 7, 28.

accidents of navigation occasioned by default of the master or crew, or any other accidents of the seas, rivers, and steam navigation, of whatever nature or kind, excepted ;” and it gives “liberty during the voyage to call at any port or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever.”

The vessel in the course of her voyage stopped at Liverpool, and on the 24th October, 1868, on her way out, came, without any fault, into collision with another vessel. The result of the collision was that she was driven ashore in an exposed place, where the beans became soaked with salt water, and the vessel herself received an injury which made it necessary that she should put back to Liverpool for repairs. She was there put into a graving dock for that purpose on the 27th, and temporarily repaired, in order to proceed to Glasgow. For the purpose of lightening the ship, and to facilitate the repairs, about one-fourth of the beans were trans-shipped into lighters, and for a like purpose other part was removed and spread out in the after part of the ship. When the ship was repaired, the beans were, without being dried or otherwise looked after, replaced in the wet state. On the 30th of October the ship proceeded to Glasgow. The beans were materially damaged by not being dried at Liverpool.

The beans might, at Liverpool, have been removed to warehouses for the purpose of being spread out and dried, and such accommodation might have been found within half a mile of the graving dock. This would have caused a material benefit to the beans, and materially checked the process of decomposition. The expense of unshipping, drying, and reshipping, according to the finding in the case, which must be regarded as a finding in fact, would have been particular average, payable by the owner of the cargo ; and that must be taken, therefore, to have been a reasonable and proper course to pursue, so far as the shippers’ interest was concerned.

It is not stated in the case what risk, trouble, expense, or delay, the drying would have caused. In the absence of any statement that either was unreasonable, and acting upon the power of “drawing inferences” given by the special case, the Court below appear to have arrived at the conclusion of fact, that the unshipping, drying, and reshipping of the cargo were, under the circum-

1872

NOTARA
v.
HENDERSON.

1872

NOTARA
v.
HENDERSON.

stances, as to time and otherwise, reasonable and proper acts to be done by the person having charge of the cargo, assuming that there was any legal duty imposed upon him to take active steps for that purpose.

During the stay of the vessel at Liverpool, the shippers, who were on the spot, called the shipowners' attention, through their agent, also on the spot, to the state of the beans, and to the fact that they would be seriously injured unless dried at once, and they requested that either the beans should be taken out and dried, and then reshipped for Glasgow, or that they should be delivered at Liverpool at a proportionate freight, so that the shippers might dry them for themselves. The shipowners refused to accede to either alternative. They offered to deliver at Liverpool, upon being paid the whole freight; but insisted that, unless the whole freight was paid, they had a right to retain and carry on the beans, undried, and getting worse for want of drying, as they were, in order to earn the whole freight upon arrival at Glasgow, provided the beans arrived in specie, whatever might be their condition.

The shippers refused to pay more than the freight pro ratâ, and the shipowners took on the beans without drying them, and thereby occasioned further damage to the beans, which, quite exclusive of the damage proximately and necessarily caused by the collision, and limited to the consequence of the neglect to dry (of course calculated after allowing for the estimated expense of unshipping, drying, and reshipping), has by consent been assessed at 666*l.* 1*s.* 5*d.* (1)

The value of the cargo at Glasgow, but for the collision and its results, proximate and remote, would have been 3500*l.* The value in the state in which it arrived was 1167*l.* 7*s.* 8*d.* The entire loss caused, whether proximately or remotely, by the collision was, therefore, 2332*l.* 12*s.* 4*d.*, out of which the remote loss caused by

Post 229

(1) After judgment had been given for the plaintiff in the Queen's Bench, an average-stater was appointed under a judge's order, *by consent of the parties*, to assess the damages, being the difference between the damage which the beans would probably have sus-

ained if unshipped and dried at Liverpool and the damage which they actually sustained by being carried on to Glasgow. The arbitrator awarded 666*l.* 1*s.* 5*d.*, and judgment was afterwards entered for that amount.

neglect to dry amounts to 666*l.* 1*s.* 5*d.* The shippers do not claim in respect of the damage necessarily caused by the collision and its unavoidable results, but only for the estimated aggravation of that damage by reason of nothing having been done in the way of drying to arrest or mitigate decomposition, and for that amount (666*l.* 1*s.* 5*d.*) they obtained judgment in the Court of Queen's Bench. (1)

Upon that judgment the shipowners have assigned error, alleging that they were entitled to retain and take on the beans in their wet state, and were not bound to do anything to check the damage occasioned by the collision.

The case was very fully and ably argued by Mr. Field for the defendants and Mr. Milward for the plaintiffs, before the Lord Chief Baron, Martin, Channell, and Cleasby, BB., and Willes, Byles and Keating, JJ.; and we took time to consider our judgment.

The question thus raised is a compound one of law and fact; first, of law, whether there be any duty on the part of the shipowners, through the master, to take active measures to prevent the cargo from being spoilt by damage originally occasioned by sea accidents, without fault on their part, and for the proximate and unavoidable effects of which accident they are exempt from responsibility by the terms of the bill of lading; and secondly, of fact, whether, if there be such a duty, there was, under the circumstances of this case, a breach thereof in not drying the beans.

The law, up to a certain point, is clear and well settled by authority. The shippers, though upon the spot, were not entitled to the possession of the beans for any purpose without paying the full freight to Glasgow. That freight was not due, but the shipowners were entitled to retain the goods as a security for earning it. The offer of *pro ratâ* freight may have been reasonable, but it was one which the shipowners were not bound to accept; and it must be treated as an attempt to compromise, not affecting the rights of the parties, though it may bear upon the reasonableness of the course pursued, assuming such reasonableness to be material in determining the question of neglect.

It was argued for the shipowners that the fact of the shippers being upon the spot negated any implied duty on the part of the

1872
NOTARA
v.
HENDERSON.

(1) See note ante, p. 228.

1QB D 626

1872

NOTARA
v.
HENDERSON.

master, as agent of necessity, to take care of the goods; but this argument will not bear examination. The shippers were present, but they could not lawfully touch the goods without leave. The shipowners refused to let them do so without payment of a sum not yet earned, and insisted upon retaining the goods, with the rights, and consequently the duties, of the original bailment, whatever those might be. The shippers thereupon insisted upon the goods being properly taken care of by the shipowners, who retained the control of them as a pledge for their freight.

That a duty to take care of the goods generally exists cannot be doubted; and the question raised is, whether it extends to incurring expense and trouble in preserving the cargo from destruction or serious deterioration from the consequences of sea accident, for which originally the shipowners were not liable, by unshipping and drying it, where that is a reasonable and ordinary course to take, and would certainly have been adopted by the shippers if the whole adventure had been under their control and at their risk.

9 Ex 138 It is remarkable that, upon a question so familiar to persons conversant with maritime affairs, and which has so constantly to be considered from another point of view in settling claims upon policies of insurance, the reported authorities in this country, so far as regards the mutual rights and liabilities of shipper and shipowner, should be so rare. The only case in which it was much discussed is that of *Tronson v. Dent*. (1) That was an action by shipper against master for non-delivery of goods pursuant to a bill of lading. The vessel, the *Erin*, left Calcutta for Hong Kong partly laden with opium, suffered damage by collision, and was obliged to put into Singapore for repair. The repair lasted twelve days. Part of the opium was damaged by salt water to such an extent that the master, acting honestly, thought proper to sell it, and the amount realized by the sale was paid into court. The shipper, however, insisted upon recovering the value of the opium at the port of discharge, and proceeded to trial, where evidence was given that the opium might have been carried on in specie—at least, if dried during the stay for repairs. The Chief Justice directed the jury in effect that, if the master could “with

(1) 8 Moo. P. C. 419.

reasonable exertion" have brought on the damaged opium in the marketable state of opium, either in the *Erin* or in some other vessel, he should have done so. The jury found for the plaintiff, and an appeal was brought to the Judicial Committee upon, amongst other grounds, misdirection, and that the verdict was against the weight of evidence. The direction was criticised in the judgment delivered by Sir John Patteson as follows (1): "An objection that is made to his summing up is with respect to these words, 'with reasonable exertion;' and it is assumed that, by the words 'reasonable exertion' he told the jury that it was the master's duty to have trans-shipped the goods, or at least, that it was his duty to have dried the opium; and if it took two months to have dried the opium, it was his duty so to have done after he himself had left the place, because he clearly was not bound to keep the ship there for the purpose of doing so. If the ship could have been repaired in twelve days, of course he could have gone on at the end of those twelve days; but he was bound to get somebody to attend to the drying of the opium, and then to forward it to Hong Kong. I think it is a great stretch of ingenuity to say the words 'reasonable exertion' mean all that. I do not know what the words 'reasonable exertion' actually and necessarily import, but certainly there was some exertion which it was the master's duty to have made on that occasion. It is stated, I think, by foreign authorities, that it is the master's duty to trans-ship; but doubt is raised as to that; and in our courts it should seem to be considered that he is quite at liberty to do so, and that, if he does trans-ship, he would be protected in doing so, if it turns out, in the opinion of the jury, that it was the proper course of dealing with the goods, but that he is not positively bound to do so. If his own ship cannot carry them on at all, he may either leave goods which are not perishable, or sell goods which are in their nature perishable, which cannot be carried on, which must, of course, be sold; but that is not the case here. But although he may not be bound to trans-ship, he is at liberty to do so. In other cases it has been held that he ought to take all proper care of the cargo; but there is no authority that I know of which distinctly shews that he is bound to lay out a great deal of

1872

 NOTARA
 v.
 HENDERSON

(1) 8 Moo. P. C. at pp. 455-7.

1872
NOTARA
v.
HENDERSON.

money in order to endeavour to repair the damage done to the cargo, either by drying or in any other way. While the cargo is there, he may not have the means of doing so. He is bound to ventilate it, and so on; but that, I apprehend, is while it is on board the ship. And I think, if I am not mistaken, there is some case of a ship in Ireland, where there was a cargo of corn, and the question was, whether it could be kiln-dried, and whether the master was bound to kiln-dry it there. The case did not turn on whether he was bound to do so; but, if I remember the case, he had done it, and the question was, whether he was at liberty to do so. It was clear he was at liberty to do so; and here he would have been at liberty to have taken steps to dry this opium during the twelve days he was at Singapore. Whether he was bound to do it or not need not be determined in this case; nor do I find that it was laid down by the judge, at least, I cannot collect from his language here that he laid down to the jury that the master was bound to do any such thing, but merely that he was bound to use reasonable exertion to have brought the opium on. It is, in order to be carried on, taken out of the vessel; therefore, if by reasonable exertion he could have dried the outside of the chests, and put them back into the vessel afterwards to be taken to Hong Kong, he was bound surely to use that 'reasonable exertion' at all events" . . . "On the whole question I think we should be justified in saying, that he really did tell the jury that he was not bound to trans-ship or to lay out a great deal of money in the drying of the opium, but that he was bound to carry it on if it could be carried on in a merchantable state." Upon this construction the direction was sustained and the judgment was affirmed.

This judgment of the Judicial Committee, though it does not define the duty of the master, does not disaffirm his duty to take reasonable care, whether passive or active, to save and preserve a cargo damaged by sea accidents.

The effect of the decision appears to be, that the duty of the master to use "reasonable exertion" to preserve the goods, if necessary, by drying them, so as to make them capable of being taken on in specie, was recognized, though the limits of the duty were left unsettled. It was suggested, indeed, that the duty of taking active measures, such as ventilating the cargo, ordinarily applied to doing so on board the ship, and that under no circum-

stances was the master bound to lay out a "great deal of money" (limit not stated) in drying the cargo. It was assumed that the master was not bound, under the circumstances of that case, to delay beyond the time necessary for the repairs of the vessel. This assumption, however, can hardly be taken as intended for a proposition of law universally applicable, but rather as applicable to the circumstance that the opium then in question was only a part of the cargo, and that delay would be unreasonable to persons equally entitled to consideration as the plaintiff.

The existence of such duty to take active measures for the preservation of the cargo from loss or deterioration in case of accidents is, however, distinctly recognized in the maritime law in one important particular,—wherein it follows the civil law, which, though it be not recognized as *jus commune*, either here or abroad, in mercantile or maritime affairs (see Baldasseroni, *leggi del cambio*, 31) has been the source of many valuable rules,—namely, that the master may incur expense for the preservation of the cargo, and may charge such expense against the owner of the cargo in the form of particular average. This maritime right is, in one point of view, analogous to that of salvage, and it may be urged that the services in respect of which it is rendered should, as in the case of salvage, be looked upon as optional and not obligatory. There is, however, this marked distinction, that the master, as representing the shipowner, has the charge of the goods under contract for the joint benefit of the shipowner and shipper, and falls within the class of persons who are under obligation to take care of and preserve the goods as bailees (*Pothier, Obligations*, art. 142, and *Nantissement*, art. 29 et seq., and as to extraordinary expenses, art. 60, 61; and also under the special head of care imposed upon masters, *Louages Maritimes, Charte-partie*, art. 31). This obligation on the part of the master has been commonly recognized, both in respect of preserving goods on board in a state of safety by pumping, ventilation, and other proper means, and of saving goods which by accident have been exposed to danger. Thus, even in case of wreck, it is laid down, in a work on sea laws, approved by Lord Stowell (1), that the master "ought to preserve the most valuable goods first, and by attention and presence of

1872

NOTARA
v.
HENDERSON.

16BD31

(1) 1 Hagg. Adm. at p. 232.

1872
NOTARA
v.
HENDERSON.

mind endeavour to lessen the evil; and save, or help to save, as much as possible": Jacobsen, book 2, chap. i., p. 112. It is recognized in the French Code generally in Article 222; and as to the right to charge the cargo with particular average for extraordinary expenses incurred to preserve it, in Article 403 [2]; in the Spanish Code in Article 935 [1] as to like expenses; and in the German Mercantile Code, with its usual good sense and fulness, in Article 504; where the duty of the master to take care of and preserve the cargo for its owners, at their expense (Article 722), in case of accident, and for avoiding or *lessening* the loss thereby occasioned, is specially enforced and provided for, to an extent, perhaps, beyond what our own law has yet been held to recognize. The master is to take every possible care of the cargo during the voyage, in the interests of all concerned. When special measures are required to avoid or lessen a loss, he is to protect the interests of the owners of the cargo, as their representative, under their direction, if possible, otherwise according to his own discretion, giving an account of what he has done. He is, in such cases, specially authorized to discharge all or part of the cargo. In extreme cases to avert considerable (erheblicher) loss, on account of imminent deterioration or other causes, he may resort to sale or hypothecation, to procure means for its preservation or transport. He is to reclaim it in case of capture or detention, and to take all extrajudicial or judicial steps for its recovery, if otherwise taken out of his charge.

There are unquestionably cases in which the exercise of such a duty would be incumbent upon the master, as representing the owners of the ship and for their interest. As, for instance, in the case of a perishable cargo so damaged by salt water that it could not, in its existing state, be taken forward in specie to the port of discharge, so as to earn the freight, but which could, at an expense considerably less than the freight, be dried and carried on. In such a case, to earn the freight, it might be for the interest of the owner of the ship to save the cargo by drying. To sell it, or abandon it, would give no right to freight pro ratâ against the owner of the cargo, nor any right to recover against the underwriter upon freight: *Mordy v. Jones* (1), recognized in *Philpott v.*

(1) 4 B. & C. 394.

Swann. (1) In *Mordy v. Jones* (2) the cargo was so damaged that it would have cost more than the freight, though less than the value of the cargo, to restore it, and no question arose as to the right of the owner of the cargo, because he consented to the sale. But we are at present supposing a case in which it would have been for the shipowner's interest to dry and save the goods; as, if the freight were 1000*l.*, the expense of drying 100*l.*, and the rest of the voyage so long that, but for the drying, fermentation would destroy the specific character of the cargo before arrival. In such a case, if the process were also for the benefit of the owner of the cargo, the expenses would have fallen, according to the ordinary practice, upon the cargo as particular average. It is clear, therefore, that there are cases in which it is the duty of the master to save and dry the cargo, even as between him and his owner, though the expense of his performing that duty fall upon the cargo saved. Can it be that this duty of taking care of the cargo by active measures, if necessary, at the expense of the cargo, is owing only to the shipowner, or that it is other than a duty to take reasonable care of the cargo, both in its sound state and in arresting the damage to which it has become liable by accidents of the sea, for the benefit of all who are concerned in the adventure?

In the result it appears to us that the duty of the master, in this respect, is not, like the authority to trans-ship, a power for the benefit of the shipowner only to secure his freight, *De Cuadra v. Swann* (3), but a duty imposed upon the master, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration, by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability.

The exception in the bill of lading was relied upon in this court as completely exonerating the shipowner; but it is now thoroughly settled that it only exempts him from the absolute liability of a common carrier, and not from the consequences of

1872

NOTARA
v.
HENDERSON.

(1) 11 C. B. (N.S.) at p. 281; 30 L. J. (C.P.) at p. 360. (2) 4 B. & C. 394.

7 Jan. N.S. 1292 (3) 16 C. B. (N.S.) 772.

1872

NOTARA
v.
HENDERSON.

the want of reasonable skill, diligence, and care, which want is popularly described as "gross negligence." This is settled, so far as the repairs of the ship are concerned, by the judgment of Lord Wensleydale in *Worms v. Storey* (1); as to her navigation, by a series of authorities collected in *Grill v. General Iron Screw Collier Co.* (2); and as to her management, so far as affects the case of the cargo itself, in *Laurie v. Douglas* (3); where the Court (in a judgment unfortunately not reported at large) upheld a ruling of Pollock, C.B., that the shipowner was only bound to take the same care of the goods as a person would of his own goods, viz., "ordinary and reasonable care." [These authorities and the reasoning upon which they are founded are conclusive to shew that the exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence, and that it is inapplicable to the case of a loss arising from the want of such care, and the sacrifice of the cargo by reason thereof, which is the subject-matter of the present complaint.]

It was also argued, that if there was any default of duty, it was the fault of the master exclusively, and not of the shipowners. This argument might have had some plausibility, if the vessel had been wrecked or abandoned, and the objectionable conduct of the master had not taken place in the course of his employment and for the supposed benefit of his owners. The master is the general agent of the owner for the purpose of the voyage, and for the exercise of that agency is intrusted with powers, to be used at his discretion, in which the owner who selects him is satisfied to confide. If, therefore, the master exercises a power which circumstances might justify, so that it is within the general scope of his functions, and it turns out that the facts do not warrant its exercise in the particular instance, as, for instance, if he unnecessarily throw goods overboard in a panic, or sell goods without justifying need, the owners are held liable for his acts, according to the rule, "*Omnia facta magistri debet præstare qui eum præposuit*": Pothier, *Louages Maritimes*, 48; *Ewbank v. Nutting* (4); and for a like reason they must be liable for his culpable omissions.

(1) 11 Ex. at p. 430; 25 L. J. (Ex.) at p. 3.

(2) Law Rep. 1 C. P. 600; Law
Rep. 3 C. P. 476.

(3) 15 M. & W. 746.

(4) 7 C. B. 797.

12 Jan 1872

For these reasons we think the shipowners are answerable for the conduct of the master, in point of law, if, in point of fact, he was guilty of a want of reasonable care of the goods in not drying them at Liverpool.

1872
NOTARA
v.
HENDERSON.

This raises, in the end, the question of fact, whether there was a breach of the duty thus affirmed, a question which, though properly one for a jury, we are, under the power given in the special case, to draw inferences of fact, and the 32nd section of the Common Law Procedure Act, 1854, bound to determine. It is obvious that the proper answer must depend upon the circumstances of each particular case, and that the question, whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by shewing damage done and suggesting measures which might have been taken to prevent it. A fair allowance ought to be made for the difficulties in which the master may be involved. The performance of such a duty, whether it be for the joint benefit of the shipowner and the shipper, or for the benefit of the shipper only, could not be excused by reason of insignificant delay not amounting to deviation; and there are many cases of reasonable delay in ports of call, for purposes connected with the voyage though not necessary for its completion, which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty.

In the present case the circumstances affecting the propriety of drying the beans are not stated in detail, and a good deal is left to our general knowledge and experience. It is common knowledge that beans are a cargo which specially suffers from damp, that the effects of the damp spread and are aggravated from hour

1872

NOTARA
v.
HENDERSON.

to hour, that such a cargo, therefore, if damp, ought to be dried, if reasonably possible, and not sent on in a state of fermentation. It must be taken from the finding as to particular average, that such drying would have been a reasonable and prudent course in the interest of the shippers, and one which they would have been sure to take if they had been owners of the whole adventure. The facts stated are all in favour of the conclusion that the beans might have been dried, during an insignificant delay, at a moderate expense, which there would have been no difficulty in providing from or upon the credit of the shippers; and no circumstance is stated to shew any special risk, trouble, inconvenience, or other objection. The master thought proper, as he was entitled to do, to reject the offer of the shippers to take the beans out of his hands upon terms not unreasonable, and insisted, as he was entitled to do, upon keeping them in pledge for the future freight; and having done so, he thought proper to re-ship and replace a large part of them and put to sea with them in a state in which no prudent or reasonable man would have shipped or put to sea with them, taking the risk of their arriving at Glasgow just in the state of beans, so as to carry full freight for the shipowners, but largely deteriorated by the fermentation during the transit.

We thus agree with the Court below, that the duty exists in law, and that, under the circumstances, the breach of duty is sufficiently made out in fact, and that the defendants, as shipowners, are liable in damages.

The judgment of the Court of Queen's Bench must therefore be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Gregory, Rowcliffes, & Rawle.*

Attorneys for defendants: *Markby & Tarry.*

WALLEN AND ANOTHER v. FORRESTT AND OTHERS.

1872

Interrogatories by Defendant in Ejectment—Tenant seeking to prove Landlord's Title expired.

Jan. 31.

A tenant withholding possession of demised premises after the termination of his lease, and defending an action of ejectment brought by his lessor, will not be allowed to administer interrogatories to the plaintiff which seek to ascertain the fact that the title of the latter has expired.

RULE calling upon the defendants to shew cause why an order of Hannen, J., allowing certain interrogatories, should not be rescinded.

From affidavits and admissions made in the case, it appeared that the defendant Forrestt occupied certain premises as tenant of the plaintiffs, John Wallen and Alfred Wallen, paying rent for the premises, under a lease for a term of years which expired in 1868; that he continued tenant on the terms of the lease until Midsummer, 1869, when his tenancy ended; but he then refused to give up possession, and had since held the premises, paying no rent.

The plaintiffs brought this action of ejectment, whereupon the defendants, endeavouring to shew that the plaintiffs' interests in the land were leasehold, and had ceased by effluxion of time, obtained the order in question, allowing them to put to the plaintiff John Wallen the following interrogatories, viz. :—

1. Did you not, in the month of June, 1868, or at some other and what time, represent to the defendant Thomas William Forrestt that you were the agent of your mother, the late Mrs. Sarah Wallen (being then alive), and, as such agent, you had authority from her to negotiate with the said defendant as to his taking from her, for the term of one year, the premises in the writ in this action mentioned; and, if yea, was not such representation so made by you true in substance and in fact?

2. Did you not, at the same time or some other time, represent to the said defendant that your said mother's interest in and title to the said premises would terminate on the 24th of June, 1869, or on some other day in the month of June, 1869?

1872

WALLEN
v.
FORRETT.

3. Was it not in fact true that the said interest and title would and did terminate on one of the said days of June in 1869?

4. Did not the said premises belong to and form part of the estate of your late father, Joseph Wallen? Did not your late mother, the late Mrs. Sarah Wallen, die before the 11th day of March, 1871?

5. Of whom did your late father hold the said premises, and when did the term vested in him expire; did it on the 24th, or some other day, of June, 1869?

6. Has or have not your late father, or your late mother, or the trustees of your father's will, or the executors of your mother's will, or yourself as agent for your mother or otherwise, paid rent to any one, and if so, to whom, in respect of the said premises, and if yea, was any rent paid after Midsummer, 1869?

Barnard shewed cause. (1) Although a tenant cannot dispute the title of his landlord, yet he may shew that the term for which the latter held the premises has expired. The estoppel ceases with the landlord's interest. If the defendants were to give up possession to a person who had no title, they might be liable to an action for mesne profits by the rightful owner of the land, and so might have to pay twice over. A party to a suit may administer such interrogatories as he would be allowed to put to a witness in court. These interrogatories do not ask, "Had you no interest when you demised to the defendants?" but, "When did your interest expire?" In *Flitcroft v. Fletcher* (2) the defendant in an action of ejectment was allowed to administer interrogatories by which, after questioning the plaintiffs as to whether they claimed as heirs-at-law or as trustees, he asked, "Have you, or any of you, any right to or interest in the premises except as aforesaid, and if so, what is the nature of such right or interest?"

[BLACKBURN, J. There the defendant was not let into possession by the persons who set up the title, and he merely asked for such information as the plaintiffs would formerly have had to set out in their count on a writ of right.]

In *Finney v. Forward* (3) Martin, B., said, "No doubt claimants

(1) In the Bail Court, before Blackburn and Quain, JJ.

(2) 11 Ex. 543; 25 L. J. (Ex.) 94.

(3) 35 L. J. (Ex.) at p. 44.

(2) L. J. 25 Jan 25 191

in ejectment have been forced to answer interrogatories respecting the pedigree of persons under whom they claimed; but the practice has always been considered an anomaly."

[BLACKBURN, J. From the report in Law Rep. 1 Ex. at p. 8, it appears that my Brother Martin limited his remark to cases where after long possession the defendant is assailed by a stranger of whose title he is ignorant.]

Gibbons, in support of the rule. The object of these interrogatories is to find out weakness in the plaintiffs' title. *Flitcroft v. Fletcher* (1) has been disapproved in *Stoate v. Rew* (2), a case of similar interrogatories, which was followed in *Pearson v. Turner*. (3) There it is said that the Court should exercise its discretion by allowing interrogatories in ejectment "where the affidavit discloses the fact of the defendant having long been in undisputed possession of the premises sought to be recovered, and being ignorant of the nature of the title started upon him." *Compton v. Earl Grey* (4) is an authority in equity favourable to the plaintiffs; so likewise is *Bolton v. Corporation of Liverpool*. (5) There the defendant in an action for town dues filed a bill of discovery, seeking to investigate certain deeds evidencing the title of the corporation to the dues. It was held that the plaintiff in equity had no right to the inspection prayed for; and Lord Brougham, C., said: "The plaintiff here does not claim anything positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation." The present defendants likewise try to obtain an answer which may destroy the plaintiffs' title, and yet only serve to shew that the defendants have no title. It is not suggested that any claim has ever been made to the premises save by the plaintiffs. There is no bonâ fide defence.

1872

WALLEN
v.
FORRESTT.

BLACKBURN, J. Having looked at my Brother Hannen's note,

(1) 11 Ex. 543; 25 L. J. (Ex.) 94.

(3) 16 C. B. (N.S.) 157; 33 L. J.

(2) 14 C. B. (N.S.) 209; 32 L. J. (C.P.) 224.

(4) 1 Y. & J. 154.

(C.P.) 160.

(5) 1 My. & K. 88, 92.

11 SC 2 Jan 25. 191.

10 Jan 25. 731

1872
WALLEN
v.
FORREST.

we can, I think, understand the ground upon which the rule nisi was granted, and why the interrogatories were allowed; but, seeing the facts as they now appear, I certainly come to the conclusion that the order for these interrogatories should be rescinded. The case is this: the plaintiffs being in actual possession of the land—and, in the absence of evidence to the contrary, they must be assumed to be owners of the fee—made a lease to the defendants, who were let into possession, and paid rent for a number of years; then, the term having expired, the defendants would, in an ordinary case, have nothing else to do but either to take a new lease or give up possession. They do neither; and if they simply relied on the weakness of the plaintiff's title, they would have no defence to the action of ejectment, for it is their duty to restore the land to the person from whom they received it, and, according to a fixed principle in the law of landlord and tenant, they, the defendants, are estopped from denying the title of their lessors. One exception there is to that rule of estoppel, for when tenants can shew that the title of their landlord has expired, they may do so. I question the justice of that exception, but it is decidedly law.

Now, by the interrogatories before us, the defendants ask, in effect, not merely, "Was your testatrix in possession; had she the fee simple, or any title at all?" but "Had she not a term which justified the making of a lease to us, but which has since expired?" And an affirmative answer would, according to the questionable law I have mentioned, justify the defendants in not restoring the land to those from whom they received it. Are the defendants, however, entitled to our assistance to make such a discovery? If it had appeared that the true owner in fee simple was attacking them, or that they had attorned to some one, and were therefore defending their possession, then these interrogatories might have been proper enough for raising the real question; but when the matter was before my Brother Hannen at chambers it was not shewn to him, as it is to us, that the defendants have no more title than that of mere squatters, and, on the motion for the rule nisi, he complained that the fact had not been brought to his notice. Nor has it been shewn that the defendants have been in any way assailed by a reversioner. Then, under the circumstances, are we

to grant these interrogatories which, upon a surmise or suspicion, ask for the plaintiffs' title in order that a flaw may, if possible, be found; are we to give the defendants an iniquitous opportunity of baffling their lessors, who seek to recover the land demised? When we once bring the question to that point, then I think the two cases apply of *Stoate v. Rew* (1), where, I having refused such interrogatories, the Court of Common Pleas supported my decision; and *Pearson v. Turner* (2), in which my Brother Byles had granted them, but the same Court rescinded the order.

Those cases were approved of in *Finney v. Forward*. (3) It seems to me that we should be aiding a "fishing" application if we allowed these interrogatories, and I do not think that my Brother Hannen would have granted them if the fact of the defendants having no better right to the possession than that of squatters had been sufficiently brought under his notice.

QUAIN, J. I am entirely of the same opinion. There is no authority to shew that such interrogatories as these have ever been granted under like circumstances. For here the defendants, after being let into possession of the land by the plaintiffs, originally for a term of many years, and paying rent, when asked to yield up the premises, refuse to do so (although they do not assert that they claim to hold through another person, or that another claims the land from them), and want us to assist their defence by calling on the plaintiffs to answer interrogatories. The case of *Fliteroft v. Fletcher* (4) has been very much doubted; and, if law at all, only applies to such a state of facts as is referred to in *Stoate v. Rew* (5), by Erle, C.J., who says: "If a man has been long in possession of an estate, and a stranger comes to dispossess him, the defendant may call for some general information as to the nature of the title which is to be made against him." That is the only principle upon which *Fliteroft v. Fletcher* (4) can be supported. But the present case has no resemblance to that. Here are tenants trying to hold over against the very landlords who let them

1872

WALLEN
v.
FORREST.

8/11/11

(1) 14 C. B. (N.S.) 209; 32 L. J. (C.P.) 160.

(3) Law Rep. 1 Ex. 6.

(2) 16 C. B. (N.S.) 157; 33 L. J. (C.P.) 224.

(4) 11 Ex. 543; 35 L. J. (Ex.) 94.

(5) 14 C. B. (N.S.) at p. 211.

10 June 1871

(4/5/11 June 1871)

1872
WALLEN
v.
FORREST.

into possession, and seeking to find a flaw which will enable them to do so successfully. Neither at law, nor in equity, nor in justice, are they entitled to our assistance.

Rule discharged.

Attorneys for plaintiffs: *Billing & Venn.*

Attorney for defendants: *S. Prentice.*

Jan. 31.

DUNN AND ANOTHER v. THE COMPANY OF PROPRIETORS OF THE
BIRMINGHAM CANAL NAVIGATION.

*Canal Company—Rights and Liabilities as between Canal Company and Owners
of subjacent Mines.*

198, 121
70RD422 The defendants' canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defendants were authorized to take land compulsorily and construct the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the powers of the Act. Commissioners were appointed who were to determine from time to time what sum should be paid for the purchase of lands, and also to determine what other distinct sum should be paid by defendants as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals; provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months notice to defendants, who might inspect the mines, and might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defendants to inspect the mines the owners were authorized to work them.

Plaintiff was owner of mines under the canal, and gave defendants proper notice of his intention to work them; defendants did not inspect, and refused to purchase. Plaintiff proceeded to work the mines, without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably disturb the strata, and that there was danger of the water escaping from the canal into the mines; but, except as above, plaintiff did not work his mines in any negligent or unskilful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, and without doing so he could not have obtained the full benefit of his coal. The canal was in good order when plaintiff commenced working his coal; and defendants did all they could to keep the canal watertight, by puddling, &c. During part of the time, while plaintiff's working was going on, they had dammed back the water, and so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for plaintiff to work out his coal. The

defendants were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated, and the water of the canal escaped through the cracks and flooded the workings, and plaintiff was obliged to abandon his coal.

The plaintiff thereupon brought an action, charging that defendants, having brought water into the canal, so improperly managed the canal and the water, that it escaped and flooded plaintiff's mine. On the above facts, the Court having power to draw inferences :—

Held, by Cockburn, C.J., Mellor and Lush, JJ., that an action of tort could not be maintained.

Semble, by the same judges, that the plaintiff was entitled to compensation under the Act for the loss of his coal.

Hannen, J., being of a contrary opinion on both points

affirmed on the whole 2Q 81g 42.

DECLARATION, that plaintiffs were lawfully possessed of a coal mine, and that defendants brought water into a canal near the coal mine, and so carelessly and improperly managed the canal and the water therein, that the water escaped into and flooded the coal mine whereby the mine was damaged.

The material pleas were: 1st. Not guilty. 2ndly. That plaintiffs were not possessed as alleged. 3rdly. Except as to the charge of negligence and improper conduct, that the water was brought into the canal in pursuance of certain Acts of Parliament, authorizing the construction and maintenance of the canal. That the coal mine near to and under the canal was not worked till after the completion of the canal, and that the water escaped out of the canal into the coal mine without any negligence or default on defendants' part. Issue joined.

At the trial before Montague Smith, J., at the Worcester Summer Assizes, 1869, a verdict was taken for the plaintiffs subject to a case to be stated by an arbitrator.

1. By a Local Act, 16 Geo. 3, c. 66 (herein called "The Dudley Canal Act"), certain persons were incorporated by the name of "The Company of Proprietors of the Dudley Canal Navigation," and full powers were given to them to construct and maintain a canal in the parish of Dudley, in the county of Worcester and Kingswinford, in the county of Stafford.

2 and 3. The following parts of the Act were referred to in argument or judgments of the Court. [The sections of the Act are not numbered, the numbers refer to the pages.]

1872
—
DUNN
v.
BIRMINGHAM
CANAL CO.

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

The Act recites (p. 1587) that the making and maintaining of a canal for the navigation of boats, &c., as therein described, would "render the carriage of coal, iron-stone, and limestone, from several mines, in that part of the country, and divers other goods and merchandise, much easier and cheaper than at present, which would be of great advantage to the trade and manufactures" of the district, and of the towns and countries therein named, and that certain persons therein named were willing to undertake the construction and maintenance of the said canal; it creates those persons a company, with perpetual succession, to construct and maintain the canal, and to supply the same with water from certain streams and watercourses, and to make reservoirs, feeders, and aqueducts, for supplying the said canal with water, and to make various other works which they might think requisite and convenient for the purposes of the said navigation, and also (p. 1591) from time to time to alter, repair, amend, widen or enlarge the same, and to do (p. 1592) all other matters and things which they should think necessary or convenient for the making, effecting, preserving, improving, completing, and using the said navigation, they and their successors "doing as little damage as may be in the execution of the powers granted to them, and making satisfaction in manner hereinafter mentioned, for all damages to be sustained by the owners, or proprietors, of such lands, tenements, or hereditaments, waters and watercourses, brooks or rivers, respectively, as shall be taken, used, removed, diverted, or prejudiced in or by the execution of all or any of the powers of this Act; and this Act shall be sufficient to indemnify them, their workmen, &c., for what they shall do by virtue of the powers hereby granted." It empowers (pp. 1599, 1600) bodies politic, corporate, collegiate and other persons under various disabilities, and all other persons, "to contract for, sell, and convey to the company, for the use of the said navigation, any lands or grounds which shall be set out and ascertained."

After reciting (p. 1601) that "differences may arise between the said company of proprietors and the several owners or persons interested in lands, grounds, tenements, hereditaments, or waters which shall or may be affected or prejudiced by the execution of any of the powers hereby granted, touching the purchase-money to be paid, or recompense to be made to them respectively," the Act proceeds to constitute and incorporate a large body of persons named, and their successors (p. 1602) to be "commissioners for the settling, determining, and adjusting all questions, matters, and differences, which shall or may arise between the said company, and the several proprietors of and persons interested in any lands, grounds, tenements, hereditaments, or waters that shall or may be affected or prejudiced by the execution of any of the powers hereby granted." It then (pp. 1603, 1604) empowers the said commissioners, or any five of them, in manner and by the means therein mentioned, "to determine and adjust, from time to time, what distinct sum of money shall be paid by the company, either by an annual rent or payment, or by a sum of money in gross, to and at the election of the several bodies politic, &c., and other persons who shall be entitled or interested as aforesaid, for the absolute purchase of the lands or grounds which shall be set out and ascertained for making the said canal, or any part thereof, and other purposes in this Act mentioned; and also to determine and adjust what other distinct sum or sums of money shall be paid by the said company, their successors, &c., as a recompense for any damages which may or shall be at any time or times whatsoever sustained by such bodies politic, &c., or other person or persons

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respectively, being owners of or interested in any lands, grounds, tenements, hereditaments, and waters, for or by reason of the making, repairing, or maintaining the said canal, or of any reservoirs, &c., and supplying the same or any of them with water as aforesaid, or by the flowing, leaking, or oozing of the water over or through the banks of the said canal, reservoirs, trenches, or sluices, . . . or by turning or diverting any streams or brooks into the same, or by reason or means of the execution of any of the powers, herein contained by the said company, their successors and assigns," &c. . . . And if (pp. 1604, 1605) either party is dissatisfied with the decision of the commissioners, a jury is to be summoned; and (p. 1608) the commissioners shall not be obliged to receive or take notice of any complaints by any person for any injury or damage by him sustained, "unless application hath been or shall be made to the company, their successors, &c., or their agents, within six calendar months next after the time such supposed injury or damage shall have been sustained, or the doing or the committing thereof shall have ceased."

All persons (p. 1633) whatsoever shall have free liberty . . . to navigate upon the said canal, with any boats or other vessels, not exceeding seven feet in breadth; . . . and also to use the towing-paths with horses, for pulling and drawing such boats and vessels; upon payment of certain tolls.

"No owner (pp. 1640, 1641) or proprietor of any mines or minerals, their workmen or servants, or other person whatsoever, shall open or carry on any work for digging, getting, or discovering such mines or minerals under any tunnel, or within twenty yards of the same, without the consent of the company, their successors or assigns. . . . And no owner, &c., of mines or minerals, shall on any account whatever open, dig, sink, or carry on any work for the getting of coal, limestone, ironstone, or mineral within the distance of twelve yards from the said intended canal or any reservoir, &c.; nor shall any coals or other minerals be got under any part of the said canal, towing-paths or reservoirs, or within or under any land lying within the distance of twelve yards of either side of the said canal, reservoirs, or other works, except as hereinafter mentioned, without the consent of the said company in writing under their common seal."

Provided (pp. 1642, 1643) "that when and so often as the owner of any coal mines, &c., or other minerals lying under the said canal, &c., or within the distance hereinbefore limited, shall be desirous of working the same, then, and in every such case, such owner shall give to the said company three calendar months' notice in writing before he shall begin to work such mines, &c. And upon receipt of such notice it shall be lawful for the company to cause such mines to be inspected in order to determine what coal or other minerals may be come at and actually gotten without prejudice or damage to the canal; and if the company shall fail or refuse to cause such mines to be inspected, within thirty days after the receipt of such notice, then it shall be lawful for the owners of such mines, and they are hereby authorized, to work and get such part of the said mines as lie under the said canal, &c., or within the distance aforesaid; and if upon such inspection the company shall refuse to permit the owners of the said mines to work such part of the same as lie under the canal, &c., or within the distance aforesaid, as they might from time to time have come at and actually gotten, or in any other manner obstruct or prevent them from getting the same, then the said company within three calendar months after such refusal or obstruction shall pay to the owners, proprietors, or workers of such mines respectively, such price for the same,

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

1872 in proportion to their several interests therein, as the next adjoining mines of equal quality should have been really and bona fide sold for, or be estimated or valued at ;” and in case of disagreement touching any or either of the matters aforesaid, then the same shall be settled by the commissioners or any five of them or by the verdict of a jury if required in manner thereinbefore provided for ascertaining the value of land, &c.

DUNN
v.
BIRMINGHAM
CANAL CO.

“Provided (p. 1657) that nothing herein contained shall extend or be construed to extend to defeat, prejudice, or affect the right of any lord or lords of any manor or manors, common or waste grounds, or of any owner or owners of any lands or grounds in, upon, or through which the canal and towing-paths, &c., or any of them shall be made, to the mines, minerals, or quarries, lying or being within or under the lands or grounds to be set out or made use of for such canal towing-paths, &c. ; but all such mines, minerals, and quarries are hereby reserved to such lord or lords of such manor or manors, or of such commons or waste grounds, and to such owner or owners of such lands or grounds respectively, their heirs and assigns ; and that it shall and may be lawful to and for the lord or lords of such manor or manors, common or waste grounds, or such owner or owners of such lands or grounds respectively (subject to the conditions and restrictions herein contained) to work all such mines and quarries, and to take and carry away all such coals, iron, stone, and minerals, as shall be gotten therein, to his and their own use ; provided that in working such mines and quarries, no injury be done to the said navigation ; anything herein contained to the contrary notwithstanding.

4. In pursuance of the Act the Dudley Canal was constructed by the company and maintained by them.

5. By another local Act, 25 Geo. 3, c. 87 (herein called “The Dudley Canal Extension Act”), powers were given to the company to extend their canal. By another local Act, 33 Geo. 3, c. 121, power was given to the company to make and maintain a canal from the Dudley Canal at Netherton to the Worcester and Birmingham Canal, and this Act incorporated the former Acts.

6. In pursuance of the last-mentioned Act, a canal called the “Netherton Canal” was constructed by the company.

7. By 5 Wm. 4, c. xxxiv. (called the Birmingham Canal Consolidation Act), certain persons were incorporated as a company by the name of “The Company of Proprietors of the Birmingham Canal Navigations.”

By s. 4, certain canals already made were vested in such company, and by s. 16 powers were given to the company to make certain new canals ; and by s. 93 it was enacted that no proprietor of mines should on any account whatever work any mine within twelve yards of the said then existing or future canals, towing-paths, reservoirs, or other works belonging to the company, except as thereafter mentioned, and except for the purpose of making gateways, headways, or tunnels of limited dimensions, without the consent of the company ; and (s. 95) if the

proprietor of mines under the said canal should be desirous of working the same, he should give one month's notice in writing under his hand of such intention to the company, who might thereupon, if they considered the working of such mines would be prejudicial to the canal, purchase the same; and the company might inspect such mines, and if they did not within one calendar month of such notice treat with the proprietor for the purchase of such mines, the proprietor might work them without being liable to the company for any damage which might be done thereby, unless such damage be wilfully done or be caused by the working of such mine in an improper manner.

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

8. By 9 & 10 Vict. c. ccxcvi., The Birmingham and Dudley Canals Consolidation Act, 1846, the Company of Proprietors of the Dudley Canal Navigation was incorporated with and merged in the defendants' company, and the canals and lands of the Dudley Canal Navigation were vested in the defendants.

9. The said several Acts of Parliament may be referred to on the argument of this case.

10. Until 1846 the Company of Proprietors of the Dudley Canal Navigation maintained and managed the Dudley and Netherton Canals, in conformity with the several Acts of Parliament herein referred to from time to time in force, and since that year to the present time, and at the time when the causes of complaint in this action are alleged to have arisen, the defendants maintained and managed the same, and kept them supplied with water.

11 and 12. There were under part of the Netherton Canal extending to some distance on both sides of the canal, two seams of coal lying near to each other. These seams were called the "Brooch Coal."

13. Lord Dudley was the owner of the mines, and under him the plaintiffs, as his tenants, acquired the right to work and get the said seams of coal, and had entered upon and were in possession of the mine and working it.

14 and 15. On the 14th of January, 1868, the plaintiffs caused the defendants to be served with a notice, that they were desirous of working, and intended after the expiration of three months from the date of this notice to work and get, in accordance with the provisions of the Acts of Parliament relating thereto, the mine of Brooch coal which lies under and within the distance of twelve yards on either side of a certain part of the defendants' canal [describing it], and that if within thirty days the company should

1872

DUNN

v

BIRMINGHAM
CANAL CO.

wish to inspect the said Brooch coal proper facilities should be afforded to the person appointed for that purpose.

16. The defendants did not inspect the mines, and they refused to purchase.

17. In April, 1868, the defendants began to repair the canal where it passed over the plaintiffs' mines, and for some distance beyond them both ways; that is to say, the part thereof included between the two dams hereinafter mentioned, and early in May the repairs were completed, and it was then in good order and condition, and its bed at and beyond the place where the plaintiffs' coal was to be worked was on that occasion properly puddled, and was watertight and would have so remained if it had been undisturbed by the working of the mines by the plaintiffs as after-mentioned.

18. In the course of the plaintiffs' workings they reached the coal lying near to and under the canal about the beginning of September, and proceeded to work out the same. The effect of the mine being got out, as the workings approached and were carried under the canal, was that the strata near to and above the void so created and the surface and the canal and the bed thereof sunk and were cracked, broken, and dislocated, and water from the canal escaped through the cracks and breaches so caused and passed through the dislocations in the strata into the plaintiffs' workings and flooded the workings in parts thereof, so that the plaintiffs were unable to get the coal so flooded, and were obliged to abandon and lost the same, and they also lost the benefit of certain gate-roads which they had been at the expense of making in order to work the coal so flooded; and it also caused an increase of the expense of getting the coal from parts of the working where it was gotten, and some of the coal was deteriorated in value from being saturated with the water.

19. While the plaintiffs' workings were proceeding, the defendants, for the protection of the canal as well as to keep its bed watertight if possible, had everything ready to repair it and to raise its banks and to fill up its bed when they should sink; and when they did sink the defendants did in fact repair and raise the banks and fill up the bed of the canal so as to restore it to its former depth (the raising of the banks after the sinking having

made the canal deeper), and this was done in a proper and careful manner, and with proper material calculated to fill up cracks if any should occur; but where the bed of a canal has been or is in the course of being broken by mining there are no certain means of keeping the canal watertight.

20. When the canal was repaired and its bed repuddled the water was taken out and kept out during the repair. This was effected by means of two dams 150 yards apart, and by cutting a trench in the side of the canal between those dams through which the water was let into an adjoining watercourse, and the position of the plaintiffs' mines was between the two dams. One of these dams was at a bridge called "Accommodation Bridge," and was formed by letting planks into grooves fixed to each side of the bridge, and backing them up with clay; and the other dam, which was at a wider part of the canal, was formed by driving piles into the bed of the canal in a line across and backing them up with clay as at the other dam; and when the repair was completed in the beginning of May, as before mentioned, the bank of the canal where the trench had been cut being also restored and repaired, the dam at Accommodation Bridge was removed, and the water let into the canal; but at the other dam the piles were allowed to remain and they prevented any through traffic on the canal, as boats could not pass them; and some time afterwards when the canal had been considerably shaken and affected by the plaintiffs' workings the planks were again put into the grooves at the bridge, but were lifted out and removed on several occasions to admit boats which were not going beyond the piles. The piles were left by the defendants as a matter of precaution for the protection of the canal, in case the plaintiffs' workings should so affect it as to render it necessary to let the water out from between the dams; so that the dams might in that case be restored without loss of time, and so that the water from the whole pound of the canal should not escape, and it was a proper precaution.

21. Some time after the plaintiffs had worked under and across the canal, and thereby broken the strata, and lowered the surface as before mentioned, and after the water had got into the mines and had done part of the damage which the plaintiffs complain of, and while such damage was still continuing, namely, in the be-

1872

DUNN

v.

BIRMINGHAM
CANAL CO.

1872
 DUNN
 v.
 BIRMINGHAM
 CANAL CO.

ginning of October, the plaintiffs met the engineer and clerk of the company at the colliery, they having come there in consequence of the plaintiffs' complaints of the water escaping into their mines, and in the course of conversation proposed to them that the defendants should let the water out of the canal and keep it empty for three months, promising that by that time they would work out the coal which could be affected by the water. This request was not complied with; but the piles were allowed to remain in the canal impeding the navigation to the extent hereinbefore appearing for a period of more than three months after the above request was made. But the defendants were guilty of no actual carelessness in management of their canal, unless it were carelessness to allow the water to be in it while the mines were worked.

22. The plaintiffs worked their mines without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably dislocate the strata, and that there was danger of the water from the canal escaping into their mines; but, if they were right in thus acting, they did not work their mines in any negligent or unskilful or improper manner, but got the coal in the manner in which the Brooch coal is ordinarily gotten, and without doing so they could not have obtained the full benefit of their coal.

23. The Court may draw such inferences of fact as in their opinion the jury ought to have drawn.

The question for the opinion of the Court is, whether the defendants are liable to the plaintiffs for the damage sustained by them as aforesaid, and how the findings on the respective issues are to be entered. (1)

1871. Nov. 10. *Huddleston, Q.C. (J. O. Griffiths with him),* for the plaintiffs.

H. Matthews, Q.C. (Macnamara with him), for the defendants.

The arguments are fully given in the judgments, and it is unnecessary to repeat them; in addition to the cases noticed in the judgments, the following cases were cited—for the plaintiffs:

(1) There were other issues as to the sufficiency of the plaintiffs' notice which were abandoned on argument, and the facts as to them are therefore omitted.

Wyrley Canal Co. v. Bradley (1); *London and North Western Ry. Co. v. Ackroyd* (2); for the defendants: *Whitehouse v. Birmingham Canal Co.* (3); *Smith v. Kenrick.* (4)

1872

DUNN

v.

BIRMINGHAM
CANAL CO.*Cur. adv. vult.*

Jan. 31. The following judgments were delivered:—

COCKBURN, C.J. This is a case of considerable importance, as affecting the relative rights and liabilities of canal and other companies, being owners of the surface of land, and of the owners of minerals lying below the surface.

The defendants are a canal company, proprietors of a canal called the Netherton Canal. The plaintiffs are the proprietors of a mine lying below a part of the bed of the canal. The action, upon which this case has been stated, is brought to recover damages for alleged negligence in the management of the canal by the defendants, by reason of which the water of the canal escaped into the plaintiffs' mine, flooded it, and prevented its working, and caused considerable damage to the works.

The defendants, besides a plea of not guilty, pleaded, except as to the charge of negligence and improper conduct, that the water was brought into the said canal in pursuance of certain Acts of Parliament authorizing the construction and maintenance of the canal; that the mines were not worked till after the completion of the same; and that the alleged injury to the plaintiffs' mines happened without any negligence or default on their, the defendants', part.

The company was formed, and the canal in question constructed under an Act of the 33 Geo. 3, in which the provisions of a prior Act, the 16 Geo. 3, c. 66, called the Dudley Canal Act, were incorporated.

By the latter Act the canal company were authorized to enter upon, set out, and take the land necessary for making the canal, and to construct the latter, "doing as little damage as might be" in the execution of the powers granted to them. In the event of the owners of the land so set out and the company not being able to agree as to the purchase-money to be paid for the land, the

(1) 7 East, 368.

(3) 27 L. J. (Ex.) 25.

(2) 31 L. J. (Ch.) 588.

(4) 7 C. B. 515; 18 L. J. (C.P.) 172.

8 Jan 4 1872

1872
DUNN
v.
BIRMINGHAM
CANAL CO.

amount was to be settled by commissioners appointed by the Act; or, if required by either of the parties, was to be assessed by a jury.

By the Act (1) the company are authorized to do all matters and things which they shall think necessary and convenient for making, preserving, completing, and using the navigation, they and their successors making satisfaction, in manner thereafter mentioned, for all damages to be sustained by the owners or proprietors of such lands, &c., as shall be taken, used or prejudiced in or by the execution of all or any of the powers of the Act; and the Act is to be a sufficient indemnity for what they shall do by virtue of the powers thereby granted.

Provision is made for securing compensation for damage caused to adjoining owners by the execution of the works which the company are authorized to construct and carry on.

The commissioners (2) are not only to determine what shall be paid for the purchase of the lands required for making the canal, but also "to determine and adjust what other distinct sum or sums of money shall be paid as a recompense for any damage which may or shall be at *any time or times whatsoever* sustained by the owners of any lands, &c., for or by reason of making, repairing, or *maintaining the said canal*, or by the *flowing, leaking, or oozing* of the water over or through the banks of the canal"; but (3) they are not to be "obliged to take notice of any complaint for injury or damage sustained, unless application has been made to the company or their agents, &c., within six months next after the time when such injury or damage shall have been sustained, or the doing or committing thereof shall have ceased."

All that was required by the company for the formation of the canal being the surface of the land, the right (4) to the mineral below it was expressly reserved to the owners of the land, subject to certain conditions and restrictions in respect of the working of it, presently to be referred to, and to a proviso that in working mines or quarries "no injury should be done to the navigation." These conditions and restrictions, imposed, evidently for the protection of the company, on the exercise of the right to the subjacent mineral

(1) Page 1592.

(2) Page 1603.

(3) Page 1608.

(4) Page 1657.

thus reserved to the landowner, are, in effect, such as to give an option to the company to prevent the working of the mineral altogether on making compensation to the owner.

The substance of the provisions thus regulating the respective rights of the parties in regard to the mineral is as follows. In the first place, it is provided (1) that no mineowner shall dig or carry on any work for mining under or within twenty yards of any tunnel, without the consent of the company. No mineowner is to dig or carry on any work for getting coal or other mineral within twelve yards of the canal or of any reservoir of the company; nor is any coal or other mineral to be got under any part of the canal, or the towing paths or reservoirs, or under any ground lying within twelve yards of either side of any of them, without the consent of the company given under their common seal.

While, however, protection was thus given to the company against the working of mines which might be dangerous to the safety of the canal, it was not intended that the owners of the mineral should be left at the company's mercy. In order, therefore, to enable a mineowner, when desirous of working the mineral, to obtain the consent required, or compensation for the loss of the mineral, it is provided (2) that if a mineowner is desirous of working a mine lying under the canal, &c., or within the prescribed distance, he shall give three months' notice to the company. Thereupon, the latter are to be at liberty to inspect the mine "in order to determine what coal or other minerals may be come at and actually gotten without prejudice or damage to the said canal, &c." If upon such inspection the company refuse to permit the mineowner to work the part so lying below the canal, &c., or within the prescribed distance, or in any other manner obstruct or prevent him from getting the same, then the company are, within three calendar months afterwards, to pay to the mineowner "such price as the next adjoining mines of equal quality shall have been really and bonâ fide sold for, or be estimated or valued at"; and in the event of any dispute arising touching any of these matters, the same is to be settled by the commissioners, subject, if required, to the verdict of a jury.

In the possible case, still remaining, of the company omitting to

1872
DUNN
v.
BIRMINGHAM
CANAL CO.

inspect the mine, and thereupon to give their consent to the working of the mineral, or, by their refusal, to place the mineowner in a position to obtain compensation, such a state of things is provided for by the enactment that, if the company fail or neglect to inspect within thirty days from the notice of the mineowner, it shall be lawful for him to work such part of the mine and get the mineral.

The purport and intent of the foregoing legislation is plain. It was intended, in the first place, to relieve the company from the necessity of including in the amount, to be paid for the land in the first instance, the value of the mineral not situate in the upper portion of the soil required for their works; and such mineral was reserved to the landowner.

Further, it was intended to protect the company against mining operations which might prove fatal or injurious to their works above, by enabling them to step in and prevent such operations, on making compensation to the owner; but inasmuch as such mineral might never be gotten by the owner, to whom it was thus reserved, or, at all events, not till a future period, and as in point of justice it would be quite time enough to pay him for it when the period came at which he really desired to get it, and would have proceeded to get it but for the powers of the company, it was intended to relieve the company from the necessity of making such compensation till that period arrived, if it should then be found expedient by the company to prevent the exercise of the right to the mineral. On the other hand, it is equally clear that it was intended to preserve to the mineowner the right either to get the mineral or to be paid an indemnity for the loss of it, at the option of the company.

This being so, it was held in the case of *Dudley Canal Company v. Grazebrook* (1), which was a case arising upon this same Act of Parliament, that where the canal company refused to inspect a mine, and thereupon to elect to give or refuse their consent to the working of it, the right to work it in such case being expressly reserved to the mineowner, if damage to the works of the company should result from the operations below, no action could be main-

(1) 1 B. & Ad. 59.

tained by the company, provided those operations had been carried on with proper care and in the ordinary course of mining.

But it is obviously a very different thing to say that, where the mineowner has by his own operations injured the bed of the canal, and so let the water into his mine, he can in an action at law recover damages against the proprietors of the canal. This is the question which we have now to decide.

In the present case, the plaintiffs, the mineowners, gave due notice to the defendants of their desire to work the part of their mine lying within twelve yards of either side of a part of the canal, and invited the company to make inspection of the mine. The company did not inspect the mine, and refused to purchase the mineral; whereupon the plaintiffs, after the expiration of the thirty days, proceeded to work the mine. In consequence of such working, and from no other cause, cracks and fissures were produced in the bed of the canal, through which the water found its way into the mine below, and flooded it, whereby the plaintiffs were unable to get their coal and sustained other damage.

It is expressly stated in the case that, shortly prior to the commencement of the plaintiffs' operations, the defendants had repaired the bed of the canal lying above the plaintiffs' mine; and that the bed was, at and beyond the place where the plaintiffs' coal was to be worked, properly puddled and watertight, and would have so remained if it had not been disturbed by the working of the mines below by the plaintiffs.

It is further found, that, while the plaintiffs' workings were proceeding, the defendants, for the protection of the canal, as well as to keep its bed watertight, if possible, had everything ready to repair it, and to raise its banks, and to fill up its bed, when these should sink; and that when they did sink, they did in fact repair and raise the banks, and fill up the bed of the canal, so as to restore it to its former depth (the raising of the banks after the sinking having made the canal deeper); and that this was done in a proper and careful manner, and with proper material, calculated to fill up cracks if any should occur; but that where the bed of a canal has been, or is in the course of being broken by mining, there are no certain means of keeping the canal watertight.

It must, therefore, be taken as an admitted fact, that there was

1872

DUNN

v.

BIRMINGHAM
CANAL CO.

1872

DUNN

v.
BIRMINGHAM
CANAL CO.

no negligence on the part of the defendants contributing to the damage occasioned to the mine, unless, indeed, the omission to empty the water out of the canal above the plaintiffs' mine, while the mine was being worked, can be so considered. But I cannot think that it was at all incumbent on the company to interrupt the navigation, which it was their business to keep open for the accommodation of the public, in order to afford the plaintiffs the opportunity of getting their coal.

To the facts before stated must be added the, to my mind, all-important, statement contained in the case, that the plaintiffs worked their mines without regard to the surface, and without attempting to support it, and with knowledge that the effect would be to let down the surface, and probably to dislocate the strata, and that there was danger of the water from the canal escaping into their mines; "although," it is added, "if they were right in thus acting, they did not work their mines in any negligent or unskillful, or improper manner, but got the coal in the manner in which the coal there is ordinarily got." It must be taken also that without doing this they could not have obtained the full benefit of their coal.

Upon this state of facts, it seems to me that this action, which is founded on the alleged negligence of the defendants in the management of the canal, cannot, at all events in its present form,—all negligence in such management being expressly negatived,—be maintained. But as the declaration might possibly be amended, so as to be adapted to the actual facts of the case, I proceed to consider how far an action at law, in whatever form the declaration may be framed, can, under the circumstances stated, be held to lie against the defendants for the damage occasioned to the mine,—this being, as I apprehend, the question submitted for our decision. It appears to me that, not only is there no authority for saying that such an action will lie, but also that in principle we ought to hold that it will not.

The case of *Fletcher v. Rylands* (1) in the Exchequer Chamber, and in which the judgment of that Court was afterwards affirmed in the House of Lords (2), was indeed relied on by the plaintiffs' counsel in argument as a conclusive authority in their favour.

(1) Law Rep. 1 Ex. 265. *12 J. N. 508.*

(2) Law Rep. 3 H. L. 330.

And, if the decision in that case were applicable to the facts of the present, I should of course bow to its authority. But it appears to me to be plainly distinguishable in two most important particulars. The Court of Exchequer Chamber held that, if a person accumulate on his land, by artificial means, a quantity of water, which, if allowed to escape on to his neighbour's land, will be productive of injury, he is bound to keep it in at his peril. In that case the plaintiff, the owner of a mine, was working it in the ordinary course. The defendant constructed on his own land a reservoir, for the purpose of working a mill, and accumulated a large quantity of water therein. Unfortunately under the ground, on which the reservoir was made, a mine had formerly been worked, and the effect of the old workings having been to weaken the soil above, when a certain quantity of water had been collected in the reservoir, the ground below gave way, and let the water down into the old workings; and as the latter communicated under ground with the plaintiff's works,—a fact unknown both to plaintiff and defendant,—the water flowed into the works and flooded them. It is true that, in that case, there was the additional circumstance that the persons employed by the defendant to make the reservoir had been guilty of negligence in not taking measures, when they discovered the indicia of the old workings, to ascertain whether the ground would bear the weight of the water about to be placed upon it, or whether the old workings might communicate with the plaintiff's mine. But the decision did not proceed on this ground. In the judgment of the Exchequer Chamber, as delivered by Blackburn, J. (1), and which was fully affirmed and adopted by the House of Lords, the ground of the decision was the broad position that he who brings on to his own land something which was not on it before, and which if it gets on to his neighbour's land may be productive of mischief, must at his peril keep it from getting to his neighbour's land; and, though he may use the utmost care and diligence to do so, will still be liable for injury done if he fails. I cannot, therefore, think that, if *Fletcher v. Rylands* (2) were otherwise applicable to the present case, the defendants could avail themselves of the admitted fact of the absence of all negligence on their part in the management of the canal.

1872

DUNN

v
BIRMINGHAM
CANAL CO.

(1) Law Rep. 1 Ex. at p. 279.

(2) Law Rep. 3 H. L. 330.

12 Jan 25 604

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

But there is more than one obvious and striking distinction between the case of *Fletcher v. Rylands* (1) and the present. In the former case the mineowner was working his mine before the defendant began to construct his reservoir. He neither knew, nor had reason to suppose, that the reservoir was being placed over old workings, or that these old workings communicated underground with his mine. There was no negligence or wilful incurring of danger on his part. In the present case, the plaintiffs saw the danger, and may be said to have courted it. They had good reason to believe that, if they proceeded to work their mine under the canal, they would bring down the water upon their works. In all probability they set to work on the calculation that, if that result should follow, as it probably would, they should get the value of the coal by bringing an action against the company. In this most important particular, this case appears to me to differ essentially from that of *Fletcher v. Rylands* (1), and not to be within the principle involved in the judgment in that case.

There is also this further most material distinction between the case of *Fletcher v. Rylands* (1) and the present. In the former the defendant in making his reservoir was subject to the common law limitation of the right of property, namely, that a man in using his own must take care not to injure another. In the present case the company were acting under statutory powers, which expressly authorized them to make and maintain the canal and navigation, subject only to making compensation if damage should at any time arise from the exercise of their powers.

These distinguishing features of the present case, while they exclude the application of the decision in *Fletcher v. Rylands* (1), also make it impossible, on principle, that such an action as the present can be maintained.

In the first place I cannot think that, where an injury results to a man, not from the danger alone to which the act of another has exposed him, but from his own wilful and intentional exposure to such danger, as its proximate and immediate cause, he, who has thus brought the injury on himself, can maintain an action in respect of it. If A. does an act which exposes B. to danger, and,

(1) Law Rep. 3 H. L. 330.

without any concurrence on the part of B., injury arises therefrom to the latter, he has of course a right of action against A. But if B., knowing the danger, wilfully exposes himself to it, he has himself brought, or at all events, contributed to bring the injury on himself, and cannot visit A. with the consequences of what, but for his own act, might never have resulted in injury at all. If A. illegally creates an obstruction in a public highway, and B., not knowing of its existence, drives against it, and damage ensues, B. has a right of action. But if B., knowing it to be there, were intentionally to drive against it for the purpose of knocking it down, and by doing so occasioned damage to himself, he would be without remedy; more especially, if at the time he did so he calculated on bringing an action for damages in the event of his sustaining injury. Analogous examples might be multiplied, but one is sufficient to illustrate the principle for which I am contending, namely, that no action at law can be maintained for an injury which has been brought about by the wilful and intentional act of the party complaining, as its proximate and immediate cause, such act having been done by him with his eyes open, in other words, with a knowledge that the injury would be the probable consequence of the act so done by him.

Again, the act on the part of the defendants, on which the plaintiffs rely as having caused the damage of which they complain (assuming even that they have a right to ascribe that damage to the conduct of the company, instead of to their own acts), being that of keeping water in the canal, and this having been made lawful in the company by the statute, it is impossible to say that what is thus expressly legalized can be made the ground of an action of tort.

The argument that the present action will lie appears to me to be founded on an imperfect appreciation of the real ground in respect of which the plaintiffs can have any well-founded cause of complaint. The wrong, if any, done to the plaintiffs was not that the canal company caused damage to the mine by negligence in managing the canal; for such negligence is expressly negatived: nor was it that they kept the water in the canal while the plaintiffs were carrying on their works below: for, in keeping the water in the canal for the purpose of the navigation, the defendants were

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

1872

DUNN

v.

BIRMINGHAM
CANAL CO.

only acting in conformity with their statutory powers and their duty to the public. The only wrong that can be said to have been really done to the plaintiffs was that, while it was impossible for them to get their coal without bringing on themselves the disaster which has in fact ensued, the defendants omitted to inspect the mine, and so to ascertain the true state of things, and thereupon to fulfil the obligation which the Act of Parliament evidently contemplated their taking upon themselves, though it might be only for their own protection,—namely, that of paying the value of the mineral and thus compensating the plaintiffs for the loss of it.

But though, morally speaking, the defendants may have acted unjustly in not purchasing the coal of the plaintiffs, under the circumstances in which the latter were placed, I cannot think that they were under any legal obligation to do so. The Act does not make it obligatory on them to inspect the mine proposed to be worked, or to exercise their power of preventing the owner from working it. Their powers in those respects are conferred for their own protection; and may be exercised, or not, at their option. If they do not think proper to exercise them, they may, if they please, leave the mineowner to exercise his right of property over the mineral, and to work his mine, or not, as he may be advised.

What, then, is the position of the mineowner under such circumstances, if the mine cannot be worked without imminent danger to the canal above and to the mine itself below? It does not lie in the mouth of the canal company to say that he should proceed to get his coal, when, by the hypothesis, he may do serious damage to the navigation, which by the express terms of the Act he is prohibited from doing. He cannot be reasonably expected as a prudent man to incur the danger of destroying his own works, when, if the view I take of this case is right, if he did so he would be precluded from bringing an action against the company, as having by his own act occasioned the damage. Is he then reduced to the alternative of foregoing the advantage of getting his mineral without remedy against the canal company, whose works have placed him in this position? I think certainly not. It appears to me clear that a mineowner thus circumstanced would be entitled to compensation under the clause providing for compensa-

tion for damage occasioned by the execution of the company's works. That clause is general in its terms. It is not confined to damage caused by the company's works at the time of their execution, but extends to damage whensoever it arises as the necessary result of such works. If, on the one hand, the company obtain the advantage, as they do, of having the compensation for mining interests interfered with postponed till the mines are actually worked, they cannot be heard to say that the damage to the mineowner from inability to work a mine by reason of their works is one which should have been claimed for and assessed at the time the land was taken. When the mineowner, who would otherwise work his mine, finds himself prevented from doing so by reason of the defendants' works above him, except at a risk which no prudent man could reasonably be expected to incur,—a state of things which practically amounts to an absolute inability to work his mine,—he, in my opinion, sustains damage for which he is entitled to compensation. I think, therefore, that when the plaintiffs found themselves unable, owing to the immediate proximity of the canal, and the danger arising from it, to work their mine, except at the risk of its almost certain destruction, this inability constituted damage for which they were entitled to compensation under the statute, and for which they might have sought and obtained compensation, in the manner prescribed, through the commissioners, who are, or may be, perpetuated under the Acts. Whether the plaintiffs, by adopting the course of attempting to work their coal, instead of asking for compensation for the loss of it, whereby they occasioned the flooding of the mine, or by reason of the lapse of time, have precluded themselves from still having recourse to the statutory remedy, it is unnecessary now to determine. I am, indeed, disposed to think that they would still be entitled to compensation for the loss of the coal, which, owing to the making of the canal they never could have got; while as regards any mischief to their works beyond the loss of the coal, occasioned by the flooding of the mine, and in respect of which damages could only be recovered in an action of tort, they would be unable to recover, such damage having been the consequence of their own acts. It is however unnecessary to come to any decision on these matters, or to determine whether

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

1872
DUNN
v.
BIRMINGHAM
CANAL CO.

the plaintiffs have, or might have had, any or what remedy under the statute; and I have only thought it desirable to work out this part of the question in order to shew that the inability to get the coal, as arising from the existence of the canal, was damage under the Act, for which compensation might have been obtained under it, and cannot therefore form a ground for an action of tort against the defendants.

The special case before us being stated on an action of tort, all we have to consider is, whether, in whatsoever form, an action of tort will lie against the defendants on the facts stated. But, there having been nothing in the conduct of the defendants, either as to anything done or anything left undone, which was of a wrongful character, or otherwise than arising in the due execution of their statutory powers, I am of opinion that no such action can be maintained against them, and that, consequently, our judgment should be in their favour.

My Brother Lush concurs in this judgment.

MELLOR, J. [after stating the pleadings, and the effect of the preamble of 16 Geo. 3, c. 66, and of the clauses set out in parr. 2 & 3, and the facts in parr. 14, 16, 17-19, and 22.] In this state of facts, the plaintiffs seek to recover damages from the defendants for the loss of that portion of their coal, which the flooding of the mines by the water which escaped out of the canal prevented their getting.

It is to be observed, that no negligence in point of fact is imputed to the defendants; but, on the contrary, it is clear that the canal was kept and maintained in proper order and condition, that is, well puddled and watertight. And this raises the question, whether, under the provisions of the Acts of Parliament which regulate the relation of the parties to each other, the defendants can be made liable in an action, *without negligence in fact*, for loss accruing to the owners of the mine by reason of the flooding thereof occasioned by their own act without some act or default done or suffered by the defendants. I am of opinion that they cannot.

In the case of *Dudley Canal Company v. Grazebrook* (1) the pro-

(1) 1 B. & Ad. 59.

visions of 16 Geo. 3, c. 66, came under the consideration of this Court, in an action the converse of the present, wherein the company sought to recover damages against an owner of coal mines, for working his mine, after notice and refusal by the company to purchase, whereby injury had accrued to the navigation. In that case the mineowner had been guilty of no negligence in the working of his mine, and it was sought to make him liable under the words of the proviso [p. 1657], "that in working such mines and quarries no injury be done to the said navigation, anything herein contained to the contrary notwithstanding." The Court, in that case, put a limit on the generality of the words in the proviso, and Bayley, J., in delivering the judgment, said: "If this proviso is to be construed literally, it is inconsistent with the 62nd section [pp. 1642-3] for if the owner in working mines is to be responsible *at all events* for any injury or damage only (1) to the canal, would the company ever purchase the minerals from such owner?" And accordingly the language of the proviso was interpreted to mean "either that the party working the mines is to do no unnecessary damage or injury to the navigation, or no extraordinary damage or injury by working them out of the ordinary and usual mode." (2) That construction of the proviso was afterwards affirmed in *Stourbridge Navigation v. Earl of Dudley* (3), in which a case, arising under a canal Act containing similar provisions, came under the consideration of a Court of error, and there is no doubt that it must now be considered as settled by those cases, that under circumstances such as exist in the present case, no action would lie by the defendants against the plaintiffs. Indeed, Martin, B., quoted, during the argument in the latter case, from the judgment delivered by Bayley, J., in the former case: "It is not necessary to give an opinion whether the defendants could have got their minerals in any manner that they pleased without being liable to an action. The point for our decision is, whether they are responsible for the damage done to the plaintiffs by working their own mines in the ordinary and usual mode." (4) This construction was actually adopted in a subsequent Act, 5 Wm. 4,

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

(1) Sic, quare "done."

(3) 3 E. & E. 409; 30 L. J. (Q.B.)

(2) 1 B. & Ad. at p. 74.

108.

(4) 1 B. & Ad. at p. 68.

7 Jan MS. 329

1872
 DUNN
 v.
 BIRMINGHAM
 CANAL CO.

c. xxxiv., which is one of the Acts the powers of which are now vested in the defendants, and under which certain canals now vested in the defendants were constructed.

No suggestion is to be found in those cases which can support the proposition now contended for, viz., that the mineowner might possibly maintain an action against the canal company, in case of damage resulting from water escaping from the canal into the mines, caused solely by the owner's own act.

The case of *Fletcher v. Great Western Ry. Co.* (1) was also cited by the plaintiffs' counsel; but that case is peculiar in its circumstances, and is certainly no authority for the plaintiffs' contention, and carries it no further than do the cases before cited. It was an action to recover compensation which had been assessed under the Lands Clauses Consolidation Act, in proceedings which had been occasioned by a notice from the railway company to the mineowners; and the only way in which it bears on the present case is that the railway company, having purchased the surface of certain lands for the purpose of constructing their railway, and having taken a conveyance in the form prescribed by that statute, were held not entitled to support from the subjacent minerals, so as to prevent the mineowner from getting the same as might have been done under a voluntary conveyance at common law; and Martin, B., in his judgment thus described the relation of the parties: "The owner is to be at liberty to go on working the mines in a proper and careful manner, due and proper care being taken to prevent injury to the railway." This case was followed by *Great Western Ry. Co. v. Bennett* (2), which was virtually brought to reverse the judgment of the Court of Exchequer and the Court of Exchequer Chamber in the above-mentioned case of *Fletcher v. Great Western Ry. Co.* (1), but which conclusively established the propriety of these decisions, and the right of the mineowner to recover the compensation for his minerals, which had been assessed under the 78th section of the Railway Clauses Consolidation Act. The main reliance of the plaintiffs in support of their right to maintain this action, was, however, placed upon the cases of *Bagnall v. Lon-*

(1) 4 H. & N. 242; 28 L. J. (Ex.) 147; in error, 5 H. & N. 689; 29 L. J. (Ex.) 253.

(2) Law Rep. 2 H. L. 27.

WSC 6 Jan 1891.

don and North Western Ry. Co. (1), *Barber v. Nottingham and Grantham Ry. Co.* (2), and *Fletcher v. Rylands.* (3) If the circumstances of the present case bring it within the authority of those cases, then, of course, we are concluded by authority, and our judgment must be for the plaintiffs.

1872
DUNN
v.
BIRMINGHAM
CANAL CO.

In *Bagnall v. London and North Western Ry. Co.* (1) the defendants had, under parliamentary powers, constructed a railway and carried it over the plaintiffs' mines in a cutting. The original soil was clay, and was impervious to water; but the removal of the clay in the making of the cutting exposed a pervious stratum subject to cracks and fissures. In consequence of the cutting, water from a brook crossed by the railway, in flood time, flowed along the cutting over the plaintiff's mines, and the side drains being insufficient to carry it off, the water flowed over the pervious surface, and so escaped into and flooded the plaintiffs' mines. The rain-water descending upon the railway and the sides of the cutting was in like manner carried along the railway, and over and into the mines. Under these circumstances it was held that the defendants were liable in an action for the damage. In delivering the judgment of the Court of Exchequer (4), Bramwell, B., describes the injury as follows: "The railway company cut and removed upwards of twenty feet in thickness of the surface. . . . This surface soil was dry and impervious to water. By removing it a porous rock was reached. The soil was in like manner cut away along the line to a district of country through which a brook flowed. Here the railway was on or above the natural level of the ground; it was carried over the brook by a flat bridge. The line of railway sloped downwards from the bridge to a part over the plaintiff's mines. The bridge was sufficient to let the ordinary water of the brook pass, but was found an impediment to the passage of water in large floods. The railway company was bound to make and maintain drains, the obligation being the same as in the Lands Clauses Consolidation Act. A flood happened in 1860, and the result of the combined acts of the company was, that water, which

(1) 7 H. & N. 423; 31 L. J. (Ex.) 121; in error, 1 H. & C. 544; 31 L. J. (Ex.) 480. (3) Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.

(2) 15 C. B. (N.S.) 726; 33 L. J. (C.P.) 193. (4) 7 H. & N. at p. 448; 31 L. J. (Ex.) at p. 129.

1450 9/11 H.S. 254.

10/11 H.S. 260

8/11 H.S. 20

1872
 DUNN
 v.
 BIRMINGHAM
 CANAL CO.

would have escaped but for the bridge, flowed down the railway, and the high ground between the brook and the surface over the mine being removed, it reached that spot, and the high ground and the protection of the clay then being gone, and the drains being imperfect, it penetrated into the mine. So also did the water falling on the spot itself, and the springs arising in the cutting." After referring to the working of the mines he proceeds: "The plaintiffs worked on, and when their workings came under the railway, from no fault or negligence of theirs, but as a natural consequence of fair and lawful working, the railway sunk and continued to do so from time to time. The defendants repaired this by throwing materials of a porous character on the sunk parts; they did not, however, repair and puddle the drains, which, from the sinking of the soil, became inefficient, and even had they been efficient, they would not have carried off the flood-water of 1860." He concludes the judgment as follows: "It is not, therefore, the works intrinsically which injuriously affect the plaintiffs, but the defendants' wrong conduct in relation to them, in not making and maintaining outlets for the flood-water, or draining it off the plaintiff's land, or covering the surface thereof with clay, and in not maintaining those drains which were efficient to carry off the rain which fell, and the spring water which arose there."

I cite this judgment at such length to shew the grounds on which it was based; for, whilst Bramwell, B., affirms most distinctly the right of the plaintiffs to work the mines as they did, it is clear that the foundation of the judgment is, that acts or defaults were done or committed, or that acts were neglected to be done by the company; and that they had not fulfilled the obligations imposed upon them by their local Act, and the clauses as to drains to be found in the Railway Clauses Consolidation Act incorporated therewith.

When the case came before the Court of Exchequer Chamber, the judgment was affirmed, and Willes, J., who delivered the judgment of that Court, thus states the grounds upon which the Court of Exchequer Chamber proceeded (1): "In this case the conjoint effect of the making of the defendants' cutting, and of their neglect to keep their drains in proper order, has been that large

(1) 1 H. & C. at p. 545; 31 L. J. (Ex.) at p. 481.

John H. S. S.

quantities of water, which but for the cutting would not have come into the plaintiff's mine, and but for the defective state of the drain would have passed away and been carried off without injury to the mine, poured down into and damaged the mine, for which damage the present action is brought." It appears, therefore, that the judgment in each Court was based upon some supposed act, omission, or default, on the part of the company, amounting to negligence in fact.

The case of *Barber v. Nottingham and Grantham Ry. Co.* (1), was also relied upon by the plaintiffs' counsel. That was an action brought to recover from the defendants a sum of money assessed by a jury as compensation, to which the plaintiffs were entitled, for injury to their lands and mines by water escaping from a reservoir; and one of the questions, and the only one which is material to the present, arose on a demurrer to the fourth plea, which stated, that the alleged damages were caused by the flowing, leaking, and oozing of the water of the reservoir through the banks thereof, and not in any other manner whatsoever, except as aforesaid, by the making or maintaining of the said reservoir, or by reason of the execution by the defendants of the powers of their Act; . . . and that it was caused by the acts of the plaintiffs themselves in sinking shafts and pits on their lands and coal mines, and in causing large quantities of water, which naturally lay and were contained in the underground soil or strata in which the said shafts or pits were sunk, and which were situate between the said shafts and pits and the said reservoir, and formed the banks and support thereof, to flow, leak, and ooze, without the defendants' default or knowledge, through the banks, and to percolate into the said pits and mines.

No doubt can be entertained that, if a company be authorized to construct a reservoir, they must make it in such a way and of such materials as will prevent a leakage and oozing through the banks thereof, to the damage of adjoining owners. It is hardly necessary to say more than that the decision proceeded on grounds entirely distinct from those of the present case, and that the plea really admitted facts which amounted to actual negligence.

But the case of *Fletcher v. Rylands* (2), in the Exchequer Cham-

(1) 15 C. B. (N.S.) 726; 33 L. J. (C.P.) 193.

(2) Law Rep. 1 Ex. 265.

1872

DUNN

v.

BIRMINGHAM
CANAL CO.

ber, was principally relied upon, and no doubt that case, affirmed as it was in the House of Lords (1), is of the highest authority, and concludes every case which comes within the principle of it. The parties there were not under the provisions of any Act of Parliament, but were acting upon their rights, and were subject to the obligations imposed upon them by the common law. In that case the defendants, for the purpose of a mill belonging to them, constructed a reservoir upon their own ground, the coal under which had at some remote period been worked out; but this was unknown at the time when the defendants gave directions to construct the reservoir; and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the subsoil. The defendants selected competent engineers and contractors for the work, and were themselves in total ignorance of such latent defect, but the persons so employed by the defendants, in the course of the working, became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings. It was found, in that case, that the defendants personally were free from all blame, but that in fact proper care and skill were not used by the persons employed by them to provide for the sufficiency of the reservoir to these shafts. The consequence was that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief. The rule of law applicable to such a state of facts is thus expressed by Blackburn, J., in delivering the judgment of the Court of Exchequer Chamber (2), and is quoted and approved by the Lord Chancellor (Lord Cairns), when the case came before the House of Lords (3): "We think that the true rule of law is, that the person, who for his own purposes brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's

(1) Law Rep. 3 H. L. 330.

(2) Law Rep. 1 Ex. at p. 279.

(3) Law Rep. 3 H. L. at p. 339.

default, or perhaps that the escape was the consequence of vis major, or the act of God." Blackburn, J., then proceeds to give several illustrations of the rule, and amongst them the case of a person whose mine is flooded from his neighbour's reservoir, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works.

These were the cases mainly relied upon on the part of the plaintiffs; and unless a real distinction exists between the case of a private individual, who, for his own purposes, collects on his own land any liquid or other matter which will be a source of danger if it escapes, and the case of a canal made under the powers of an Act of Parliament, not for the benefit of individuals, but for objects of great "public utility and convenience," it may be that the case of *Fletcher v. Rylands* (1) governs the present case.

As it appears to me, however, cases which depend entirely upon the application of common law maxims to the acts of parties in dealing with their own land, or affecting their neighbour's land, cannot govern a case in which the rights and obligations of all parties are to be found within the provisions of an Act of Parliament. When the original undertakers, to whose rights and duties the defendants have succeeded, were empowered to make the canal, and were invested with extraordinary powers for that purpose, it was upon the notion that it would render the carriage of coal, &c., from the mines and of other goods cheaper than before, to the great advantage of the trade of the district. They were, therefore, authorized to purchase and take lands compulsorily, and to divert streams, &c., and do all things necessary for the making and maintaining of the canal, and supplying it with water for the purposes of navigation, subject only to the conditions that they should do "as little damage as might be" in the execution of their powers, and should make satisfaction for all damages which might be sustained by all owners whose lands, &c., might be affected or prejudiced by the execution of their powers. Under such conditions they proceeded to construct and maintain the canal, doing all things which were necessary to enable the canal to realize the public advantage which was anticipated; and after the lapse of so many years since the canal was constructed, it must be assumed

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

(1) Law Rep. 3 H. L. 330.

1872
—
DUNN
v.
BIRMINGHAM
CANAL CO.

that they complied with the conditions, and did make satisfaction to all owners whose lands were purchased or taken, or whose interests were "affected or prejudiced" by the execution of their powers.

But this was not all that the legislature conceded in the interest and for the benefit of the canal. It imposed certain restrictions upon the owners of mines lying under or within twelve yards of either side of it, who were *absolutely prohibited from getting* their minerals within that distance without the consent of the canal company, unless after a certain notice given to such company, and a neglect or refusal on the part of the company to purchase such mines; and even in that case, the mineowners were only allowed to work their mines under and within the prohibited distance of the canal upon the terms of doing no unnecessary damage to the navigation, or no extraordinary damage or injury by working them out of the ordinary and usual mode: *Dudley Canal Co. v. Grazebrook*. (1)

The canal having been constructed under the provisions of the Act, and satisfaction having been duly made, the canal itself, subject to the rights of the public to use it as a navigation on payment of tolls, became vested in the company, and is now vested in the defendants; and inasmuch as they have always hitherto kept and maintained it as a navigation, and have managed and conducted it without any negligence or want of care, and have themselves been guilty of no act or default, can they be made liable to the consequences of the plaintiffs working their mines within the terms of the Act of Parliament, under which alone they could be permitted to work them?

If the restriction upon their ordinary rights of working their own mines did at the time "prejudice or affect their interest," it was a matter for compensation under the Act, the provisions of which are very different from those which formed the subject of consideration in *Bagnall v. London and North Western Ry. Co.* (2) The difficulty of ascertaining the value of a compensation under such circumstances may be great, but if the defendants have done nothing more than they were entitled to do under the Act, a party

(1) 1 B. & Ad. at p. 74.

(2) 1 H. & C. 544; 31 L. J. (Ex.) 480.

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prejudicially affected by the execution of their powers can only seek his remedy under the provisions of the Act which conferred such powers; and if the damage alleged to have been recently sustained is a consequence of the execution by the company of the powers of the Act, they may possibly obtain compensation now, inasmuch as the commissioners appointed under the Act for settling disputes as to compensation were incorporated with succession, and were authorized "from time to time" to take the steps provided by the Act for ascertaining the amount thereof. The probable damage to the canal from the working of the mines appears to have been the sole ground of the prohibition to work them; and it was probably supposed that the interests of the canal company would prevent the possibility of such a state of things occurring as appears to have happened in the present case. However that may be, the only power of working the mines is to be found in the statute; and I have come to the conclusion that, if compensation for the damage which is said to have resulted to the plaintiffs was not obtained on the making of the canal, as in respect of land which was "prejudiced or affected" thereby, the plaintiffs can only obtain it, if at all, under the provisions of the Act of Parliament, in the character of damage resulting from the execution of the powers thereof, and not by action at law. No action at law will lie unless there be a legal injury and resulting damage. Now what is the "injuria" here? Is it the declining to purchase the mines after notice? The defendants were under no other obligation to do so than such as might result from a sense of their own interest. Is there any obligation or duty to be implied which they have not fulfilled? The only obligation upon them must be found, directly, or by necessary implication, in the language of the statute; and, as it appears to me, they have fulfilled every obligation imposed upon them by it. Injurious results frequently arise to individuals from the execution of works of public utility which are authorized by Acts of Parliament, such as a railway, which may be lawfully worked in an ordinary and reasonable manner, although it occasion a damnum to individuals. The reason is, that, being authorized by the legislature, the reasonable working can be no injuria. The cases upon this point are numerous, and the law is thoroughly settled. In the instance suggested by Blackburn, J., in *Fletcher*

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

80B49

1872
 DUNN
 v.
 BIRMINGHAM
 CANAL CO.

v. *Rylands* (1), of the house injured by the fumes of alkali works, if the alkali works had been authorized to be erected on the spot by Act of Parliament, no action could be maintained, if the works were carried on in a proper and usual manner.

The fact is, that legislation of the description under consideration has always proceeded upon the principle, that all damage occasioned by the execution of the powers conferred on companies should be provided for by apt compensation clauses, the very object being to prevent actions being brought for any injury occasioned by the due and proper execution of such works.

In the present case, the true position of the parties appears to me to be, that the defendants have acted strictly within the powers conferred upon them by Act of Parliament, and have performed all the conditions imposed upon them; but, inasmuch as they have declined to purchase the mines, they have not acquired under the statute the right to the support of subjacent mines, which, had they purchased the surface by a common law conveyance, they would have had; and therefore, if damage be sustained by the canal being injured by the plaintiffs' proper and usual mode of working these mines, the defendants must suffer the consequences so far as they are concerned, and cannot complain of the water being thereby abstracted from the canal; but, on the other hand, the plaintiffs are simply authorized by the statute to work their mines under the canal in an ordinary and proper manner; and if, as a consequence of their own lawful acts of working, the water is let out of the canal into the mines and to some extent impedes the complete working thereof, it is a "damnum sine injuriâ", and they cannot maintain an action against what I may call innocent parties, who have done no more than they were authorized by the legislature to do. I have shewn by quotations from the judgments in *Bagnall v. London and North Western Ry. Co.* (2), that they proceeded upon the assumption of actual negligence, either in the mode in which the railway was constructed, or upon some supposed neglect or default as to drainage, from which they were not protected by the statute then under consideration. The cases, in which it was decided that

(1) Law Rep. 1 Ex. at p. 280. *12 Jan 45 606*

(2) 7 H. & N. at p. 448; 31 L. J. 31 L. J. (Ex.) at p. 481; see ante, (Ex.) at p. 129; 1 H. & C. at p. 545; pp. 267, 268.

(24 Jan 45 20.)

an action would lie, either for the compensation assessed by the jury or by an award under the Lands Clauses Act or Railway Clauses Acts, as it appears to me, afford no authority for saying that an action will lie under circumstances like the present.

I am therefore of opinion that this action will not lie, and that our judgment must be for the defendants.

HANNEN, J. I regret that I cannot concur in the judgments which have been delivered by my Lord and my Brother Mellor.

This is an action brought by the plaintiffs, owners of certain mines lying beneath a canal of the defendants, for alleged carelessness in the management of the canal and the water therein, whereby the water escaped and flooded the mines.

The defendants, in substance, plead, that the canal was made and maintained, and the water brought and kept in it in pursuance of certain Acts of Parliament; that the mines were worked after the making of the canal; and that the water escaped therefrom into the mines without any negligence on the part of the defendants.

The defendants' canal was made under an Act incorporating the provisions of the Dudley Canal Act, 16 Geo. 3, c. 66. By that Act the company was required to make compensation for the purchase of the land taken for the canal; but the mines and minerals lying under the canal were reserved to the owners thereof. With regard to the working of the mines under and near to the canal, it was enacted (p. 1642), that if any proprietor of mines under or within twelve yards of either side of the canal should be desirous of working, he should give three months notice of his intention to the company, who, if they failed to inspect the mines within thirty days, should be considered as permitting them to be worked; and if, on inspection, they refused permission, they should be compelled to purchase the same.

The reservation of the mines was subject to the proviso, that in working such mines "No injury be done to the navigation, anything therein contained to the contrary notwithstanding."

This statute has more than once been the subject of judicial interpretation; and the purpose and effect of its provisions cannot be better expressed than in the language of Bayley, J., in *Dudley*

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

Canal Co. v. Grazebrook (1), "It is clear that the company do not, in the first instance, pay to the landowner more than the value of the surface in the shape of purchase-money, or for the injury to the surface, if compensation only is made for damage; the minerals remain the property of the owner of the soil; but where he is desirous of getting them, the company have the option of purchasing at a fair price, to be settled in case of dispute in the usual way. These provisions are for the benefit of the company, who are relieved from the great expense of buying the minerals along the whole line of the intended canal, in the first instance, before it is constructed; and are enabled to postpone the purchase of them until the time when, from the state of the market in the neighbourhood, the owners really want to get them. When this happens, the company have an option either to buy, in which case the landowner cannot get the minerals, but is fully compensated for the loss of the right; or not to buy, in which case he receives no compensation at all, and his right to get them ought to remain as complete as if no canal had been made. In the latter case, the canal company have not paid for, and ought not, therefore, to obtain under the Act the right to prevent the landowner from enjoying his own property; and if he does exercise his right of enjoyment the company ought to run the risk of the consequences." It was further held, that the construction thus put upon the Act was not affected by the proviso, that, "in working the mines no injury be done to the navigation;" as this must be construed with some qualification, viz., "either that the party working the mines is to do no unnecessary damage or injury to the navigation, or no extraordinary damage or injury by working them out of the usual mode." (2)

This interpretation was, in effect, subsequently adopted by the legislature in the Birmingham Canal Consolidation Act (5 Wm. 4, c. xxxiv.) where, in a similar series of enactments, the proprietor is authorized (s. 95), in the event of the company refusing to purchase the mines, to work them "without being liable to the company for any damage, unless such damage be wilfully done or be caused by the working of such mine in an improper manner." The decision

(1) 1 B. & Ad. at p. 72.

(2) 1 B. & Ad. at p. 74.

in *Dudley Canal Co. v. Grazebrook* (1), is approved in the recent case in the House of Lords, *Great Western Ry. Co. v. Bennett*. (2)

1872

DUNN

v.
BIRMINGHAM
CANAL CO.

It appears from the facts stated in the present case, that the plaintiffs gave notice of their intention to work the mines within the prescribed distance of the canal. The defendants did not inspect the mines, and they refused to purchase. The plaintiffs, therefore, proceeded to work the mines; and at that time the canal was in good order and condition, and properly puddled and watertight, and would have remained so if it had been undisturbed by the working of the mines by the plaintiffs. The defendants, during the working, did all in their power to keep the canal watertight; but it is found that, "when the bed of a canal has been and is in the course of being broken by mining, there are no certain means of keeping the canal watertight;" and it is also found, "that the defendants were guilty of no actual carelessness in the management of their canal, unless it were carelessness to allow the water to be in it while the mines were worked." The plaintiffs, on the other hand, "did not work their mines in any negligent, or unskilful, or improper manner (unless the working of the mines, with the knowledge that there was danger that the water would thereby escape into them, was in itself improper), but got the coal in the manner in which it is ordinarily got, and *without doing so could not have got the full benefit of their coal*." The effect of the working of the mines was to let down and crack the bed of the canal, and to allow the water to pass through the fissures into the workings below, whereby damage was done to the mines to the amount of 400%.

The result of these findings is that the plaintiffs have, in fact, been to a large extent deprived of the benefit of their mines by an exercise of their rights as owners, lawful as against the defendants: *Dudley Canal Co. v. Grazebrook* (1), and not negligent or out of the ordinary course of mining, and without which they could not have enjoyed their property; that this damage would not have arisen if the defendants' canal had not been made over the plaintiffs' mines; and that the plaintiffs have never been compensated for this diminished enjoyment of their property. I think it follows, from these propositions, that the defendants are responsible for the

(1) 1 B. & Ad 59.

(2) Law Rep. 2 H. L. 27, 39.

1872

DUNN

v.

BIRMINGHAM
CANAL CO.

mischief which has resulted to the plaintiffs, in some form, either by way of compensation or by action. I reserve for the present the consideration of the question, which of these two modes of proceeding is the proper one.

I think it clear that it was the intention of the legislature that the mineowner should lose no part of the value of his minerals by reason of the making or maintaining of the canal; but, if upon the refusal of the canal company to purchase, he was bound either to abstain from getting the subjacent coal, or himself to bear the consequences resulting from his getting it, he would be deprived, pro tanto, of the benefit of his property without any compensation. That this injustice was not intended by the legislature may be illustrated by a case put by Bramwell, B., in delivering judgment in *Bagnall v. London and North Western Ry. Co.* (1) Suppose that the canal company had thought it necessary, for the safety of their canal, to refuse permission to the plaintiffs to work their mines, and so had become bound to purchase the minerals, would the company have been entitled to contend that only a nominal price should be paid, on the ground that if the plaintiffs had worked the mines they would have been drowned, and so worthless? The language of the Act (p. 1643), as well as the reason of the thing, shews that it was intended to give the mineowner a real and not an illusory remedy for the deprivation of the right to work his mines. It follows, that if the company elect not to prevent the working of the mines, the owner is left in possession of a real and not merely of an illusory right to get the minerals, that is, he has a right to get them in the usual manner, doing no unnecessary damage to the canal, the responsibility resting with the company of determining whether the water can be kept out of the mines during such working.

This argument, as it seems to me, can only be met by establishing that, when the canal company originally purchased the surface of the land on which the canal was made, they also made compensation for the risk which might afterwards arise to the mineowner, from his having to win his coal under a body of water liable to flood his workings. An argument in support of this contention may be derived from the fact, that the original compensation money does indeed

(1) 7 H. & N. at p. 450; 31 L. J. (Ex.) at p. 130. *8 June 1870*

include the price of something more than the mere surface, viz., the deprivation of the right of the mineowner, being also the surface-owner, to work the coal in an *unusual* manner, and without regard to the surface. But the answer to this argument seems to me to be, that the right of a mineowner to work his mines in an unusual, and therefore presumably an unprofitable, manner, was considered to be of so small, if of any conceivable value, that it would not materially affect the price to be assessed for the surface; or, at any rate, that the elements for estimating its value would all be capable of being ascertained at the time of taking the surface. But very different considerations are applicable to the prospective assessment of the compensation to be paid for the risk of working unopened mines, at some wholly uncertain time, under a canal, after it shall have been in existence perhaps for a hundred years. (1) It would be perfectly impossible to make such an assessment with any approach to accuracy. It would be a mere guess, with almost a certainty of doing injustice, either by not giving the mineowner a sufficient compensation for a danger, distant, indeed, but not the less serious when it arises, or by making the canal company substantially pay at once the value of the coal which the owner may never lose, a result which would deprive the company of the benefit which it was intended to confer on them, of having the payment for unopened mines postponed until they should be required, and their value better ascertainable.

These observations on the Canal Acts are supported by the authority of the Exchequer Chamber, when dealing with the analogous provisions of the Railway Acts. Willes, J., in delivering the judgment of the Court, in *Bagnall v. London and North Western Ry. Co.* (2), says: "There are practical obstacles of an insuperable character against saying that there arises, upon the making of the railway, an immediate right to compensation in respect of possible future injury to unopened mines. At that time it does not appear that the mines will ever be worked, nor that the drains will not always be kept in proper order, so that the company might contend that peradventure no damage would ever arise, and an assessment of damages in advance would be mere specula-

1872

DUNN

v.
BIRMINGHAM
CANAL CO.

(1) The governing Act in this case is of the year 1775. [Note by the judge.] (2) 1 H. & C. at p. 546; 31 L. J. (Ex.) at p. 481. *9 June 1855.*

1872
DUNN
v.
BIRMINGHAM
CANAL CO.

tion." This reasoning lands me to the conclusion that the legislature intended that the plaintiffs' predecessors in title should not be, and that in fact they were not, when the surface was taken in order to make the canal, compensated for diminution in the value of their property caused by the impossibility, now found to exist, of getting the coal under the canal without letting in the water.

I think, therefore, that the plaintiffs are now entitled to some redress for this diminution in value.

This brings me to the consideration of the question whether that redress should be sought under the compensation clause of the Act or by action.

I regret that it should be necessary to express an opinion on this point. It was not contended by counsel for the defendants that the remedy by action was improper, if the plaintiffs were entitled to any remedy, nor is this one of the points stated for argument. I thought that the question which the defendants, as well as the plaintiffs, were desirous of having determined was, whether the defendants were liable in any form, and not whether this was the proper form of remedy. But as the point was not formally abandoned, it becomes necessary to dispose of it.

The compensation clause of 16 Geo. 3, c. 66 (p. 1603), is very comprehensive in its terms, it extends to recompense for any damages which may or shall be, at any time or times whatsoever, sustained by owners of lands, &c., for or by reason of the making, repairing, or maintaining the said canal, or by supplying the same with water, or by the flowing, leaking, or oozing of the water over or through the banks, or by reason of the execution of any of the powers contained in the Act. The effect of this compensation clause is to give a recompense to any one injured by the execution of the powers of the statute, by the direct operation, or necessary consequence of any act authorized by the statute, and which, but for its enactments, would have been the subject of an action. On the other hand, damage, not being the direct result or necessary consequence of an act authorized by the statute, is excluded from the compensation clause, and remains the subject of an action. It is obvious that there must be many heads of damage as to which it is difficult to determine whether to place them on the one side or the other of the border line, dividing things which are the

necessary consequence of the execution of the powers of the Act from those which are not. The present case forms an illustration of that difficulty, but if I am right in the conclusion, that the plaintiffs are entitled to recompense for the damage they have sustained, I think we ought not to be astute to discover that they have selected the wrong remedy. Upon the facts stated in the special case, I think it appears that the drowning of the plaintiffs' mines was not the necessary consequence of the execution of the powers of the Act, but might have been prevented by the defendants. This mischief might have been prevented in one of two ways, either by purchasing the mines or by drawing off the water. It is true the defendants were not under a legal obligation to purchase the mines; but, when the time came for them to determine whether they would purchase or not, they were bound, in my judgment, to consider all the means available to them of preventing the escape of the water from the canal, and amongst these was the power to purchase the subjacent coal. The defendants either disregarded this consideration, or erred in their judgment, and the result shews that they could not keep their canal watertight without purchasing the coal. It was therefore a wrongful act on their part to keep the water in the canal without having taken the means in their power, by the expenditure of a certain sum of money, to prevent the mischief which has happened. The defendants knew, or ought to have known, that the probable result of working the mines would be to let the water through. They had not originally purchased the right to prevent the plaintiffs doing that which would probably crack the bottom of the canal; they were bound, therefore, to take all necessary measures to prevent the water which they had brought over the plaintiffs' mines from penetrating into them, and, if no other means were attainable, they ought to have bought the plaintiffs' coal.

I cannot bring my mind to the conclusion that the legislature intended that the defendants, having paid only for the right to bring water on to the surface, and not having paid for the coal below, should make use of their occupation of the surface as a means of coercing the plaintiffs into abandoning their coal for nothing; and if this was not intended, the defendants were bound to exercise their option of purchasing the subjacent coal, not

1872

DUNN

v.

BIRMINGHAM
CANAL CO.*8QB44*
*-49.50**8QB51.*

1872

DUNN

v.

BIRMINGHAM
CANAL CO.

8 Q B 44

merely with reference to the safety of their canal, but with reference to their duty towards the plaintiffs of keeping the canal water-tight; and they must be responsible for their error in judgment in supposing that they could retain the water in its channel without purchasing the coal below. It is possible,—though it does not appear from the case,—that the price which the defendants would have had to pay for the coal would have so much exceeded the damage likely to accrue to the mine and to the canal from getting the coal, that the defendants preferred to run the risk of having to pay for the damage to the mines rather than purchase them; but, though this may have been prudent on the defendants' part, it does not relieve them from the duty to make compensation by way of damages for any mischief which they have, for their own interest, allowed to fall on the plaintiffs. But further, the case shews that the defendants had the means of preventing the mischief; for it appears from paragraphs 20 & 21 that, although the defendants refused to draw off the water of the canal in order to enable the plaintiffs to get their coal, they did, for their own purposes, draw off the water for a time, and altogether stopped the through navigation of the canal, while the mines were being worked; and I think they were justified in doing so. Under ordinary circumstances, it was the duty of the canal company to keep the navigation open, but they might lawfully stop it, if such a course was necessary in order to do any repairs required for the safety of the canal, or to effect any other necessary purpose; and, if they could not otherwise avoid doing mischief to neighbouring property, they might stop the navigation for a reasonable time while they provided the necessary safeguards. This would be clear, if they could not otherwise prevent the water of the canal flooding a neighbouring house; and I think they ought to have stopped the navigation to prevent the drowning of the plaintiffs' mines, if they could not prevent it by other means; and the fact that they did so leads me to the conclusion that they could practically have kept the water drawn off from the whole 150 yards over the mines, if their sole object had been to protect themselves and not to prejudice the plaintiffs.

But it is suggested that, when the defendants refused to stop the working and to give compensation for the mines, a right at once

accrued to the plaintiffs to demand compensation for this inability to work the mines without letting in the water. I do not think that this is the meaning of the legislature. It would be a singular mode of dealing with the subject to allow the company the option whether they would purchase the coals or not, and yet to make the exercise of that option give rise to a claim to compensation for the coals which they had refused to purchase. This would render the option practically useless to them. Suppose that the value of the coal which the defendants refused to purchase was 1000*l.*, and that it was clear that the coal could not be gotten without some damage, what compensation could then be assessed? Plainly not the 1000*l.*; for that would be to make the defendants pay by way of compensation the price of that which they had, in the exercise of their right, refused to purchase; and if anything less than 1000*l.* should be given, why should it be assessed prospectively, while the true amount must be matter of speculation, rather than after the extent of damage had been ascertained by experience of the facts? I think, therefore, that the defendants, by the mere refusal to purchase, gave no ground of claim to the plaintiffs; but the defendants were bound, in determining whether they would purchase or not, to exercise their judgment as to what the probable effect of getting the coals would be; the responsibility of forming an opinion, as to the danger of the water escaping and the means of preventing it, was cast entirely on them, and not on the mine-owners, who were left, by the refusal to purchase, in full possession of the undiminished right to get their coal as they could, doing no unnecessary damage to the canal, and working in the usual way.

I am of opinion, therefore, that the plaintiffs may maintain this action against the defendants for retaining the water in the canal under circumstances, which they knew would render it incapable of holding the water, and which they had the means of preventing. The difficulty which I felt, on the argument, in deciding that the plaintiffs were entitled to recover, arose from the fact that the damage of which they complained was the direct result of their own acts, done with a knowledge of the probable consequences; but this difficulty has been removed from my mind by the consideration, that the plaintiffs' acts were done strictly within the limits of their own rights, and solely for the purpose of enjoyin

1872

DUNN

v.

BIRMINGHAM
CANAL CO.

d'QB-44

1872
 DUNN
 v.
 BIRMINGHAM
 CANAL CO.

their property in a lawful and usual manner, and were necessary for that purpose, and after the defendants, with notice of the facts, had refused to take steps within their power to prevent what has happened. This brings the case within the principle of the decision of the House of Lords in *Fletcher v. Rylands* (1) as expressed in the passage quoted by the then Lord Chancellor (Lord Cairns) from the judgment delivered by Blackburn, J., in the Exchequer Chamber (2):—"We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape." It is added: "He can excuse himself by shewing that the escape was owing to the plaintiff's default." But, for the reasons which I have given, I think the defendants in this case cannot set up such excuse; for the plaintiffs have been guilty of no default; they have merely sought to enjoy their own property in an ordinary manner. If a water company were to carry their pipes or store their water over the Metropolitan Railway, and the vibration of the trains were to loosen the pipes or reservoir and cause the water to flow down and do injury to the railway, the water company would not be entitled to defend themselves against a claim for damages by saying that the railway company ought not to have run their trains: the answer would be that the railway company in running the trains did no more than they were allowed to do in the exercise of their legal rights; and that the water company, knowing these rights, ought to have taken care, at their peril, that the water should not escape in consequence of acts which the railway company had a right to do. This illustration may be open to the objection that it is *idem per idem*; but it will nevertheless assist in shewing the relation in which, as it seems to me, the plaintiffs and defendants stand to one another.

It may be suggested that the principle laid down in *Fletcher v. Rylands* (3) is not applicable to the case of a company empowered by an Act of Parliament to collect and keep on its land anything likely to do mischief,—and to this I assent, if the escape be the

(1) Law Rep. 3 H. L. at p. 339.

(2) Law Rep. 1 Ex. at p. 279. *12 Jan 73*

(3) Law Rep. 3 H. L. 330.

necessary consequence of bringing the liquid or other thing, to the place, and in the manner authorized; and to the extent to which oozing of water through the banks of the canal is the necessary consequence of maintaining the water in it, the remedy for the mischief thereby done must be sought under the provisions of the Act; but for anything, not authorized by the Act, nor the necessary consequence of the exercise of its powers, the person or company bringing the noxious thing on to his land is equally responsible whether the right to bring it there was obtained by Act of Parliament or by any other means. In the present case, I have endeavoured to shew that, though the right to bring the water of the canal over the plaintiffs' mines was given by parliament, the right to flood the mines, under the circumstances appearing in this case, was not given, and that for injury resulting therefrom the defendants are responsible.

For these reasons I am of opinion that our judgment should be for the plaintiffs.

Judgment for the defendants.

Attorney for plaintiffs: *Warmington.*

Attorneys for defendants: *Tucker & Lake, for Ingleby, Wragge, & Evans, Birmingham.*

WILLIAMS, APPELLANT; LEAR, RESPONDENT.

Jan. 24.

Turnpike Toll—"Taxed Cart."

By a local Turnpike Act of 15 & 16 Vict. a larger toll was imposed on certain carriages, including "taxed cart," than on others:—

Held, that "taxed cart" meant a taxed cart as defined by 43 Geo. 3, c. 161. Sch. (D.) No. 4.

Purdy v. Smith (1 E. & E. 511; 28 L. J. (M.C.) 150) dissented from.

CASE stated by Justices of Devon under 20 & 21 Vict. c. 43.

The appellant, the lessee and collector of tolls at the Alphington Turnpike Gate, was convicted under 4 Geo. 4, c. 95, s. 30, for demanding and taking from the respondent the toll of sixpence for a cart and one horse driven by him through the turnpike gate, the same being a greater toll than he was authorized to take.

The local Act (15 & 16 Vict. c. cliv.), intituled "An Act to repeal the Act relating to the Exeter and the Countess Weir Turnpike Roads, and to make other provisions in lieu thereof, and to

1872

DUNN
v.
BIRMINGHAM
CANAL CO.

5th Dec 1872

1872

WILLIAMS
v.
LEAR.

authorize the construction of certain new roads, and for other purposes," authorizes, by s. 27, the tolls following:—

1. "For every horse, or other beast, drawing any gig or chair or such like carriage with a single seat only, and with two wheels only, or any double-seated carriage on two wheels only, commonly called a dog-cart, 6*d*."

2. "For every horse, or other beast, drawing any car or chair, or other such like carriage, with double seats (except a dog-cart), or any phaeton, caravan, or *taxed cart*, or any four-wheeled light carriage, if drawn by one horse or other beast only, 8*d*."

Under s. 39 the trustees reduced the above tolls as follows, the sixpence to fourpence halfpenny, and the eightpence to sixpence.

The respondent drove through the defendant's turnpike gate with one horse drawing an open cart on springs with a single shifting seat only and with two wheels only; the toll of sixpence was demanded by the defendant, was objected to by the respondent, but ultimately paid by him under protest. The cart was an ordinary market-cart used by the respondent in his business, and on other occasions, and for which he took out an excise licence; and he contended that it came within the above first description of a carriage liable to the toll of fourpence halfpenny only.

The appellant insisted that it was a "taxed cart" within the meaning of the above second description, and was therefore liable to the higher toll of sixpence.

Nov. 15. *Lopes, Q.C.*, for the appellant, contended that the respondent's cart was liable to the higher toll, and relied upon *Purdy v. Smith*. (1)

The respondent did not appear.

Cur. adv. vult.

Jan. 24. The judgment of the Court (Lush and Hannen, JJ.) was delivered by

LUSH, J. We are of opinion that the conviction is right.

The name "taxed cart" was a designation given by 43 Geo. 3, c. 161 (2), to a particular kind of carriage described in the Act, namely, to a carriage with less than four wheels, constructed wholly of wood and iron, without any covering other than a tilted

(1) 1 E. & E. 511; 28 L. J. (M.C.) 150. (2) Sch. (D.) No. 4.

5 Jan 28 1872

covering, and without any lining or springs, and with a fixed seat, without slings or braces, and without any ornament whatever other than paint of a dark colour for the preservation of the wood or iron only, and which should have the words "A taxed cart," and the christian and surname and address of the owner painted in letters of a given length and of a given colour upon the back panel, and which should not be of more than a given value. Carriages which answered these conditions were taxed at a lower rate than ordinary carriages, and they were designated "taxed carts," to distinguish them from carts or carriages which were exempt from duty on account of their being used solely for purposes of husbandry or as common stage carts. In course of time such vehicles came to be also exempted from duty, but they were still called by the old name, and are referred to in the Stamp Acts as carriages of an exceptional description which were entitled to exemption because of their peculiar construction: See 3 & 4 Wm. 4, c. 39. (1)

It cannot be doubted that many such "taxed carts" were in use at the date of the local Act, and that the term is there used for the purpose of denoting this well-known description of vehicle.

As all the earlier statutes were repealed by 32 & 33 Vict. c. 14 (2), and every carriage, whatever may be its form, construction, or value, is now subject to duty, except such as are used solely for purposes of trade or husbandry, it may be that "taxed carts," in the sense in which the term is used in the local Act, no longer exist. But, whether they do or not, the carriage in respect of which the higher toll was charged by the appellant was not one of this description, and therefore it was not liable to the toll of 6d.

The origin and meaning of the term appear to have been overlooked by this Court in deciding the case of *Purdy v. Smith* (3), where it was held that a taxed cart meant simply a carriage upon which a tax had been paid. It is clear to us that such was never the meaning of the term, and we cannot therefore follow that decision.

The appeal must be dismissed and the conviction affirmed.

Judgment for the respondent.

Attorneys for appellant: *Griffith & Brownlow.*

(1) Sect. 5.

(3) 1 E. & E. 511; 28 L. J. (M.C.)

(2) See ss. 16, 18, 39, and Sch. (E.) 150.

Spencer

1872

Jan. 25.

THE QUEEN *v.* THE JUSTICES OF STAFFORDSHIRE.

Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106) s. 27—Order of Removal, Appeal against, to what Sessions.

By 30 & 31 Vict. c. 106, s. 27, where a union extends into several distinct jurisdictions, every matter, act, charge, or complaint by which the guardians thereof are affected, or in which they have any interest, shall for the purpose of jurisdiction be deemed to arise or exist equally throughout the union.

A Poor Law Union included the township of B., situate in the county of S., and the parish of W. situate in the borough of W., which has a recorder and separate quarter sessions. Two justices of the borough, by virtue of s. 27 of 30 & 31 Vict. c. 106, made an order removing a pauper residing in the township of B. to the place of his last settlement:—

Held, that the appeal against the order was governed by and dependent upon the jurisdiction of the justices by whom the order was made, and that the appeal was therefore to the borough sessions and not to the county sessions.

RULE for a mandamus to the justices of Staffordshire to enter continuances, and hear an appeal of the guardians of the poor of Dudley Union against an order made by two justices of the borough of Wolverhampton for the removal of Ann Rudge and her three children from the Wolverhampton Union to the Dudley Union.

The whole of the Wolverhampton Union is within the county of Stafford, and it includes several parishes, and amongst others the parish of Wolverhampton and the township of Bilston. The whole of the township of Bilston is in the county of Stafford, and no part of it is within the borough of Wolverhampton. The parish of Wolverhampton is co-extensive with the borough of Wolverhampton, and the borough has a recorder and separate quarter sessions of the peace.

The pauper and her children, having become chargeable to the township of Bilston, where they were inhabiting, were by an order of two justices of the borough of Wolverhampton removed to Dudley, their last place of settlement, in the Dudley Union. The guardians of the Dudley Union appealed to the quarter sessions of the county of Stafford against the order. The quarter sessions declined to hear the appeal, on the ground that they had no jurisdiction to hear an appeal against an order of removal made by justices of a borough having a court of quarter sessions.

H. Matthews, Q.C., and *Jelf*, shewed cause. The order of removal having been made by borough justices, the appeal against the order is to the borough quarter sessions. Formerly under 4 & 5 Wm. 4, c. 76, each parish in a union was separately chargeable with the expense of its own poor, but under the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79) the cost of the relief to the poor in a parish is charged upon the common fund. Then s. 27 of 30 & 31 Vict. c. 106, provides that "where a union extends into several distinct jurisdictions, every matter, act, charge, or complaint by which the guardians are affected, or in which they are interested, shall for the purpose of jurisdiction be deemed to arise or exist equally throughout the union." The reason for this enactment is that the burden of supporting the poor, being now no longer on the parish but on the common fund of the union, is a charge by which the guardians of the union are affected, and arises and exists throughout the union. The borough justices therefore have jurisdiction over the whole union, and have power to make the order of removal. The act of removal from Bilston in the county of Stafford, must be deemed by virtue of 30 & 31 Vict. c. 106, s. 27, to be an act done in the borough of Wolverhampton; then by s. 105 of 5 & 6 Wm. 4, c. 76, the borough quarter sessions have jurisdiction, and the appeal ought to be to those sessions: *Reg. v. St. Edmund's, Salisbury* (1) *Reg. v. Justices of Suffolk* (2), and *Reg. v. Liverpool* (3), shew that the borough quarter sessions have exclusive jurisdiction over appeals against orders of removal made by borough justices.

Powell, Q.C., and *Bosanquet*, in support of the rule. The cases cited have no application; in all of them the removal was from a parish in the borough. Sect. 27 of 30 & 31 Vict. c. 106, only enables borough justices to act in the county, and the appeal was rightly brought in the court of quarter sessions for the county. The 8 & 9 Wm. 3, c. 30 is not repealed. That statute regulates the sessions to which an appeal against an order of removal is to be made. The words of s. 6 are "the appeal against any order for the removal of any poor person from out of any parish, township, or place, shall be prosecuted and determined at the quarter sessions of the peace for the county, division, or riding, wherein the parish,

1872

THE QUEEN
v.
JUSTICES OF
STAFFORD-
SHIRE.

1872
THE QUEEN
v.
JUSTICES OF
STAFFORD-
SHIRE.

township, or place from whence such poor person shall be removed, doth lie, and not elsewhere." The test, as to the sessions to which the appeal is to be taken, is from what parish is the pauper removed; here the pauper is removed from Bilston, in the county of Stafford, and the appeal must therefore be to the quarter sessions of that county. If the removal were from a parish in the borough, then the appeal against the order would be to the borough sessions. Under 30 & 31 Vict. c. 106, the complaint arising in part of the union is to be deemed to arise equally in the whole union, and the borough justices have jurisdiction to make the order, but still the question to what sessions the appeal is to lie is governed by 8 & 9 Wm. 3, c. 30, s. 6. At all events the county sessions and the borough sessions have concurrent jurisdiction; and the appeal having been brought to the county sessions ought to have been entertained.

COCKBURN, C.J. This seems to me a clear case, and I think the rule must be discharged. It is plain that when once jurisdiction is given to particular justices, that jurisdiction, with all its incidents, must continue throughout the whole course of the proceedings arising upon any of the matters of complaint to which s. 27 refers. At the time 30 & 31 Vict. c. 106 was passed, in consequence of the Municipal Corporation Act and the power and jurisdiction given to the recorders under that statute, according to the construction put upon it by this Court in several cases which have been referred to, the law was that wherever a question upon the administration of the Poor Law Acts arose in a parish within a borough, for which there was a recorder, and in which the borough justices had jurisdiction, the appeal must be brought in the court of the recorder, and not taken, as was formerly the case under 8 & 9 Wm. 3, c. 30, to the quarter sessions of the county.

The 30 & 31 Vict. c. 106, s. 27, provides, that where a union shall extend into several jurisdictions, any matter arising within any part of the union shall be considered as arising equally throughout the whole; by which it is very plain that the legislature intended this: that for the purposes of jurisdiction a matter happening in any parish of the union might be treated as arising in any other parish of the union, so as, I suppose, to give facilities for resorting to the most convenient jurisdiction in order to get the matter

decided. But it is contended that this section having made the whole union subject to any one of the distinct jurisdictions into which it extends, if in the first instance application be made to a jurisdiction which exists in one part of the union and is distinct from the jurisdiction existing in another part in which the matter first arose, the latter jurisdiction is kept alive, and if an appeal be had it may be made to the tribunal controlling the latter jurisdiction. That, to my mind, would lead to great inconvenience. There might be two appeals, there might be a race run as to which sessions should decide first, and there might be conflicting decisions. I think it plain that the legislature intended this: resort may be had to any jurisdiction into which the union itself extends, though the particular parish in which the dispute arises is not within that jurisdiction, and a decision may be obtained from that jurisdiction; but if once application be made to either jurisdiction, to that jurisdiction must any after matter arising in the course of litigation be referred. That is the only consistent and convenient construction that can be put upon that section; nor do I see that any very great harm can result from it.

BLACKBURN, J. I concur in the reasons given by my Lord, and I think this rule ought to be discharged. The justices in the borough had, before 30 & 31 Vict. c. 106 was passed, jurisdiction over all matters that did actually arise within the borough, and over nothing that arose without it; but the effect of s. 27 is, that any matter occurring within the union which a justice would have the power of determining, for the purpose of jurisdiction, may be considered as something happening in the borough, although in fact it happened outside the borough. The justices of the borough had jurisdiction to make this order of removal, though from a township in the county, because by this statute they are empowered to treat the matter as happening in the borough; and the matter to be determined having thus happened within the borough, the consequence must follow that the appeal must be to the borough quarter sessions. Had the order of removal been made by two county justices, then the appeal would have been to the county sessions. If the legislature meant that the justices in each jurisdiction should have power to act as if they were justices of the other jurisdiction,

1872

 THE QUEEN
v.
 JUSTICES OF
 STAFFORD-
 SHIRE.

1872
THE QUEEN
v.
JUSTICES OF
STAFFORD-
SHIRE.

and that the appeal should be according to the locality where the matter actually arose, we must assume that they would have used language adequate to express that intention.

MELLOR, J. I am of the same opinion. I think too much importance was attached to 8 & 9 Wm. 3, c. 30, in arguing that, as it was not in express terms repealed, it still governed this question. The object of s. 27 of 30 & 31 Vict. c. 108, was to make the parish from which the removal was to take place a matter of indifference so far as the jurisdiction of justices should be concerned; it was to substitute the area of the union for the area of the parish, and the effect was to give the borough justices a power which they had not formerly, namely, to act as if their jurisdiction extended throughout the whole union; and upon matter arising in any part of the union, the parties might go either to the borough justices or county justices, as they might be inclined. They went here to the borough justices, the borough justices made the order, and I think for the reasons which have been given by my Lord that the parties then fixed the jurisdiction for the purposes of the appeal.

LUSH, J. I have felt considerable doubt during the course of the argument, but I see so many difficulties and so much inconvenience in adopting the view contended for in support of the rule, that I have come to the conclusion that the only reasonable construction of these Acts is that which holds that the appellate jurisdiction is governed by, and dependent upon, the jurisdiction of the justices by whom the order of removal was made. In that view, it seems to me, we are obliged to do some violence to the language of 8 & 9 Wm. 3, c. 30, s. 6; but that is the only construction which will render these Acts consistent. Therefore if the justices who made the order be borough justices, the appeal from them is to the quarter sessions of the borough, and if they be county justices the appeal is to the quarter sessions of the county. That makes the machinery of the Act simple, and I see no inconvenience in so holding.

Rule discharged.

Attorney for the Crown: *Johnson.*

Attorneys for defendants: *Neal & Philpot.*

NEWBY v. VON OPPEN AND THE COLT'S PATENT FIREARMS
MANUFACTURING COMPANY.

1872

Jan. 31.

*Foreign Corporation—Liability to be sued in England—Practice—Service
of Writ.*

A foreign corporation, carrying on business in England, although not incorporated according to English law, may be sued as defendants in an English court, in respect of a cause of action which arose within the jurisdiction.

So *held*, on motion to set aside service of writ.

Service of a writ of summons on the head officer of an English branch of a foreign corporation carrying on business in England is good service, and it is not necessary to serve the process on the officer at the head office abroad.

RULE to set aside an order of one of the Masters.

The rule, the facts of the case, arguments, and cases cited, appear in the judgment.

Jan. 18. *Manisty, Q.C.*, and *Philbrick*, shewed cause.

Edward Clarke, in support of the rule.

Cur. adv. vult.

Jan. 31. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Quain, JJ.), was delivered by

BLACKBURN, J. This was a rule obtained to shew cause why an order of Master Unthank, setting aside the writ and service so far as regarded The Colt's Patent Firearms Manufacturing Company, should not be rescinded.

Cause was shewn in this term, before the Lord Chief Justice, my Brothers Mellor, Quain, and myself, by Mr. Manisty and Mr. Philbrick; and Mr. Clarke was heard in support of the rule; and the Court took time to consider.

The facts do not appear to have been very distinctly brought before the master at chambers, but we take them to be as follows: The Colt's Patent Firearms Manufacturing Company is not an English corporation; it is an American company, incorporated by American law; but this foreign corporation has a place of business in England, and there de facto carries on business just as an English corporation might do, though their principal place of

8 En 149
150, 1-2-3
5 PC 292
10 En 20
28
1 QBD 40
1 En D 28
240
1 En D 442
454
2 App Cas
383-7
6 App Cas
387
1166, 63.

1872

 NEWBY
 v.
 COLT'S
 PATENT FIRE-
 ARMS CO.

business and head office is in America. The contract which the plaintiff alleges to have been broken was, as he alleges, made in England by the foreign corporation thus carrying on business here. The writ was served on the manager of their business in England, who appears to be the head officer, and indeed the only officer, of their English branch, but who certainly was not the head officer of the American corporation in the United States.

Two points were raised and argued before us. It was said that a foreign corporation cannot be sued as defendants in an English court at all. If so, there is no remedy at all in an English court to enforce a contract made with a foreign corporation, inasmuch as the individuals who constitute the foreign corporation cannot be made liable personally on its contracts or for its torts: see *General Steam Navigation Co. v. Guillou*. (1)

There can be no doubt, since the cases of *Dutch West India Co. v. Van Moses* (2) and *Henriques v. Dutch West India Co.* (3)—which was a proceeding against the bail of the defendant in the other case, and was affirmed in the House of Lords—that a foreign corporation can sue as plaintiffs. Lord Raymond, in a note, tells us that the original cause was tried at nisi prius, before Lord King, when Chief Justice of the Common Pleas, in 1734, when it appeared that the cause of action accrued in Holland; and adds: "And upon the trial Lord Chancellor King told me he made the plaintiffs give in evidence the proper instruments whereby by the law of Holland they were effectually created a corporation there. And after hearing the objections made by the counsel for Jacob Senior Henriques Van Moyses, he directed the jury to find for the plaintiffs, who accordingly did, and gave them 13,720*l.* damages; and afterwards a motion was made in the Common Pleas to set aside the verdict; but by the unanimous opinion of that Court the motion was denied." This points to a difficulty which arose both in *General Steam Navigation Co. v. Guillou* (1) and in *Ingate v. Austrian Lloyd's Co.* (4), for it must often be a nice and difficult question whether a continental company is really, by the law of its own country, a corporation or not; but no such difficulty arises where the company is one belonging to Scotland, or one of our

(1) 11 M. & W. 877.

(2) 1 Str. 612.

(3) 2 Ld. Raym. 1532.

(4) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323.

4 Jan 25. 9/75.

own colonies, or to those parts of the United States where the common law prevails. In the *Carron Iron Co. v. Maclaren* (1) the Master of the Rolls had granted an injunction against the appellants, a Scotch, and therefore a foreign, corporation. The injunction was dissolved on the ground that the appellants were foreigners, and as such entitled to the advantage which the law of their own country gave them; but no objection was raised on the ground that the court of equity could not treat a foreign corporation as a defendant. It is true that we are not aware of any reported case in which a foreign corporation has been sued in a court of law, but it seems to follow, from their being permitted to sue as plaintiffs, that they must be suable as defendants. It is, however, enough to say that we will not, on this ground, prevent the plaintiff from proceeding. The corporation may, if so advised, raise the question after appearing on the record.

The other and more difficult question is, whether the corporation has been properly served, supposing them to be suable. It was argued that the American corporation was resident in America, and must be served, if at all, as a foreigner resident out of the jurisdiction, subject to the difficulties which are pointed out in *Ingate v. Austrian Lloyd's Co.* (2) This would be so, if the foreign company had merely employed an agent here, who made a contract for them; but we think it is different where the foreign corporation actually has a place of business and trades in this country. This is a point of very considerable practical importance. There are already several Scotch banking corporations that have established branches in London. We see, from this case, that there is at least one American corporation that has set up a branch business here, and there will probably soon be more. Such a corporation does, for many purposes, reside both in England and in its own country. In the case of *Carron Iron Co. v. Maclaren* (3) Lord St. Leonards, taking a different view of the facts from that taken by Lords Brougham and Cranworth, thought the Scotch corporation was resident in England. We think that there is great good sense in what Lord St. Leonards states to be the law on his view of the facts. He says: "If the service on the agent is

1872
NEWBY
v.
COLT'S
PATENT FIRE-
ARMS CO.

(1) 5 H. L. C. 416.

(2) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323.

(3) 5 H. L. C. at p. 459.

4 Jan 1875

1872.
NEWBY
v.
COLT'S
PATENT FIRE-
ARMS CO.

right, it is because, in respect of their house of business in England, they have a domicile in England; and, in respect of their manufactory in Scotland, they have a domicile there. There may be two domiciles and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction, one in Scotland and one in England; and for the purpose of carrying on their business one is just as much the domicile of the corporation as the other." The majority of the Lords took a different view of the facts, and thought that, though the corporation possessed property in England, and had agents there, they did not carry on business there; but we do not find that they differed from Lord St. Leonards' view of the law if they had agreed as to his facts; and in the present case the fact is clear that the American company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there.

One more point has to be noticed. At common law the service of a writ on a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer, so as to secure that it came to the knowledge of the corporation, and then proceeding by distress: see 1 Tidd's Practice, p. 121, ed. of 1828. The 2 Wm. 4, c. 39, s. 13, and 15 & 16 Vict. c. 76, s. 16, in fact only re-enact the old law as to what should be service on a corporation. The clerk or officer must be in the nature of a head officer, whose knowledge would be that of the corporation. We think that, when once it is established that the corporation is to be treated as resident in England, the proper officer is the officer at the English branch, and that it is not necessary to serve the process on the officer at the head office abroad.

We have been furnished, by the courtesy of Mr. Horace Lloyd, as *amicus curiæ*, with the papers in a case of *Roberts v. Grand Trunk Ry. of Canada*. (1) It appears that the defendants, being a Canadian corporation, had a board of directors who acted for them in England. The writ was served on the secretary of that board, and on an affidavit of service judgment was signed. Crowder, J., at chambers stayed all proceedings on the judgment on the terms that the defendants should bring money into court.

(1) Not reported.

1872. 442

The case was, therefore, in its circumstances very similar to the present. The present Chief Justice of the Common Pleas, on an affidavit of these facts, and an affidavit of merits, obtained in the Exchequer a rule nisi to set aside the judgment. The rule was made absolute: "The defendants to appear in ten days. The money to remain in court to abide the order of the Court or a judge. Costs of the application to be costs in the cause."

If we could be sure that this was the judgment of the Court pronounced in invitos, it would seem clear that the Court of Exchequer thought the judgment regular, and only to be set aside on terms, and it would therefore be an authority in favour of the view we take. But we rather think that the matter was settled by the agreement of counsel, without the Court being called on to pronounce any opinion on the subject; and therefore we do not rely on this as a decision.

The result is that the rule in the present case must be made absolute.

Rule absolute.

Attorney for plaintiff: *G. E. Thomas.*

Attorneys for defendants: *Harper, Broad, & Battcock.*

IN RE HOLLAND.

Jan. 30.

*Articled Clerk—Binding to Two Partners—Enrolment of Articles 6 & 7 Vict.
c. 73, s. 8.*

A clerk may be articled to more than one member of a firm of attorneys.

MOTION on behalf of an articled clerk for an order to a master of the court directing him to enrol the applicant's articles of clerkship under 6 & 7 Vict. c. 73, s. 8. The clerk was bound by the articles to two partners of a firm of attorneys.

Jan. 29. *Lumley Smith*, in support of the motion (1), cited Chitty's Archbold's Practice, 11th ed., vol. i. p. 31. *in 14th ed.*

Cur. adv. vult.

(1) In the Bail Court, before Blackburn and Quain, JJ.

1872

IN RE
HOLLAND.

Jan. 31. BLACKBURN, J. We have conferred with the master and have ascertained that the reason of his refusal to record the execution of the articles was simply this, viz., that the practice has hitherto been invariable to bind the clerk to one partner only of a firm. It was therefore thought desirable that the opinion of the Court upon the case should be obtained at the beginning rather than at the end of the service.

An attorney can have but two clerks artied to him during the same period, and, therefore, if he has a partner, and a clerk is artied to both members of the firm the number of artied clerks which the firm may take would necessarily be diminished. Hence, doubtless, the present practice of binding the clerk to one master only. But the judgment in *Ex parte Bayley* (1) certainly seems to countenance a binding to two attorneys. Nevertheless, there are inconveniences which might result to them if the clerk were artied to the firm, and also possible inconvenience to the clerk, if the partnership were dissolved, for he could not serve two masters. But if the applicant chooses to be bound to both partners he may take the risk. A binding to both is a binding to each, and is not, I think, contrary to the spirit of the Act of Parliament, and therefore, if the parties choose to adopt that form of engagement, knowing the consequences which may result, they are at liberty so to do.

Order granted.

Attorney for the applicant: *Senior, Attree, & Johnson.*

(1) 9 B. & C. 691.

LLOYD AND ANOTHER v. FLEMING.

1872

LLOYD AND ANOTHER v. SPENCE.

Jan. 11.

Marine Insurance—Assignment of Policy after Loss—Right of Assignee to sue in his own Name—31 & 32 Vict. c. 86, s. 1.

A policy of marine insurance can be assigned, under 31 & 32 Vict. c. 86, s. 1, after loss, so as to entitle the assignee to sue upon it in his own name.

In an action upon a policy of marine insurance by the executors of E., deceased, against an underwriter, the declaration alleged that a policy of insurance on goods in a ship was underwritten by the defendant, that the goods were lost by the perils insured against, and that after the loss "the said policy of insurance, together with all rights accrued under and by virtue thereof, was, by the assured, for good consideration duly assigned to E. in his lifetime":—

Held, on demurrer, that although the assignment was made after loss of the goods, yet as the policy, "together with all rights accrued under it," had been duly assigned to E., he became "entitled to the property thereby insured," within the terms of 31 & 32 Vict. c. 86, s. 1, and was entitled to sue upon the policy in his own name, and that the declaration was good.

DECLARATION by the plaintiffs, executors of William Entwisle, deceased, that by a policy of insurance bearing date the 17th of October, 1860, certain persons trading under the firm of Robinson & Fleming, did, &c., make assurance, lost or not lost, at and from Rotterdam to Batavia, on 802 boxes of steel, valued at 800*l.*, in the ship *Twée Anthonys*. And the defendant, in consideration of a certain premium to him paid on that behalf by certain persons interested in the goods, and whose interest in the goods is hereafter averred, underwrote the policy for 100*l.*, and became an insurer thereon to the said persons for that amount on the goods. And the goods were shipped on board the ship at Rotterdam / aforesaid to be carried therein on the voyage, and certain persons hereinbefore referred to, that is to say [naming them], or some or one of them, were or was then and thence and until and at the time of the happening of the loss hereinafter mentioned, interested in the goods to the amount of all the moneys by them insured thereon, and the policy was made by authority and for account and benefit of the said persons so interested, and the ship with the goods on board sailed on the voyage, and while she was proceeding on the voyage the ship was stranded and the goods were by the perils insured against injured, damaged, and lost. And

106B
252

1872
 LLOYD
 v.
 FLEMING.

after the loss and misfortune as aforesaid, the policy of insurance, together with all rights accrued under and by virtue thereof, was by the said persons, for good consideration to them moving from William Entwisle, duly assigned to him in his lifetime, whereby and by reason of the premises the defendant became liable to pay to the plaintiffs, as executors of William Entwisle, a large sum of money. (1)

Demurrer and joinder.

1871. Nov. 28. *F. M. White* (*Lanyon* with him), in support of the demurrer. Formerly the assignee of a marine policy could not sue in his own name. By 31 & 32 Vict. c. 86, s. 1 (2), he is enabled to do so if he is "entitled to the property" insured. That Act applies only to the case of an assignment before loss of the subject-matter of the insurance. The averment in the declaration that the policy, "together with all rights accrued under and by virtue thereof," was "duly assigned," is not enough. It is incumbent on the plaintiffs to shew a title to sue, which can only vest where the property has passed. There is no authority for saying that a mere assignment of the policy transfers the property in the goods insured. The theory upon which this statute is based is the same as that of the Bills of Lading Act (18 & 19 Vict. c. 111).

[BLACKBURN, J. That Act was skilfully drawn by Mr. Cowling, who framed a very different preamble, in which the former law is accurately recited.]

Holker, Q.C. (*McLachlan* with him), contra. The preamble to 31 & 32 Vict. c. 86 recites that it is expedient that the assignees of marine policies of insurance should be enabled to sue thereon in their own names. The words in s. 1, relied upon by the defendants, were doubtless inserted to prevent the Act effecting a repeal

(1) The form of declaration was the same in both actions.

(2) By 31 & 32 Vict. c. 86, s. 1:—
 "Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee

of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected."

of the statute prohibiting wager policies. "All rights accrued" under this policy passed by the assignment of it. And the averment in the declaration that it was "duly assigned" means, that it was so assigned as to enable the assignee to sue under the contract. After loss of the goods the rights against the insurers stand in the place of the property. If the argument used in support of these demurrers were valid, there never could be a case in which an assignee after total loss would be entitled to sue in his own name, and the very object of the Act would be frustrated.

White, in reply.

Cur. adv. vult.

Jan. 11. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.) was delivered by

BLACKBURN, J. In each of these cases the declaration is by the executors of William Entwisle against underwriters on a policy of marine insurance on goods.

The declaration states a loss by the perils insured against, and then avers that, after the loss, "the policy, together with all rights accrued under and by virtue thereof, was by the assured for good consideration to them, moving from the said W. Entwisle, duly assigned to him in his lifetime."

To this there is a demurrer, on the ground that the action cannot be maintained in the name of the assignee.

It is clear that before the statute 31 & 32 Vict. c. 86 it could only have been maintained in the name of the original contractor; but ~~by~~ that Act, after reciting generally that "it is expedient that the assignees of marine policies of insurance should be enabled to sue thereon in their own names," enacts that "whenever the policy of insurance on any ship, or on any goods in any ship, or on any freight has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee shall be entitled to sue in his own name."

The argument in support of the demurrer was, that this enactment was confined to cases where the policy is assigned, before the loss, along with the goods; and in support of this the words "entitled to the property" were relied on, as, it was said, the assignee after a loss could not be so entitled; but we do not think

1872

 LLOYD
v.
FLEMING.

,1872

LLOYD

v.

FLEMING.

that such was the intention of the legislature, nor do we think the words cited have that effect.

A policy of marine insurance is a contract of indemnity against all losses accruing to the subject-matter of the policy from certain perils during the adventure. This subject-matter need not be strictly a *property*, in either the ship, goods, or freight; for, as has been long said, if a man is so situated with respect to them that he will receive benefit from their arriving safely at the end of the adventure, or sustain loss in consequence of their not arriving safely, he has an insurable interest: see per Lawrence, J., in *Lucena v. Craufurd*. (1) If the assured, before the termination of the adventure, has parted with all interest in the subject-matter of the insurance, *he* can suffer no damage from any subsequent loss; and consequently, from the nature of the contract being one of indemnity, he cannot recover in respect of any loss subsequent to his transfer of the property: see *Powles v. Innes*. (2) And for exactly the same reason an attempted transfer of the beneficial interest in the policy, before loss, to a person having no beneficial interest in the subject-matter is inoperative; for the cestui que trust of the contract having nothing in respect of which to be indemnified, could recover no indemnity. But after the loss has happened and the adventure is over, this reason ceases at once. The assured may sell the damaged subject of insurance, thereby, as it were, ascertaining how much his loss is, and yet recover for the loss he has sustained. It is every day's practice, where a ship has sustained damage, to sell the injured hull for the benefit of whom it concerns, and then sue on the policy. If it can be made out that the loss is total, the sale is for the benefit of the underwriters who pay the total loss. If the loss proves partial only, it is for the benefit of the assured, but no one ever thought of saying that the sale of the damaged hull put an end to the right to recover an indemnity for the partial loss.

The reason of the distinction is, that after the loss the right to indemnity no longer depends on the right of property in the subject-matter of the insurance, so far as it still exists, but on the right of property in the thing or the portion of the thing lost. After a loss the policy of insurance and the right of action under it might,

(1) 2 B. & P. (N.R.) 269; 300.

(2) 11 M. & W. 10.

like any other chose in action, be transferred in equity, though at common law the action must have been brought in the name of the original contractor, the assignor. Such an assignment may be objectionable on the ground of maintenance or champerty, but it is not necessarily so, and no circumstances are stated on this record to raise such a defence. It seems to us that the general object of the legislature was to make the right of action on policies of marine insurance assignable at law; and that the assignment of a policy after loss is within the object of the Act. There is a very common form of commercial adventure, where goods are sold for a price to cover cost, freight, and insurance, payable on receipt of the shipping documents. In such a case the policy and bill of lading are habitually made the subject of sale, whilst the parties are ignorant whether the goods are safe or not. It could never, we think, be intended to except from the Act such cases, if it should turn out that the loss accrued before the sale.

The words relied on (1), in the case of an assignment before loss, express what is necessarily implied, and so are superfluous; perhaps inserted *pro majore cautela*.

In the case of an assignment after loss, when the policy and "all rights under and by virtue of it" are assigned, it seems to us that the assignee becomes "entitled to the property thereby insured;" for then it is ascertained that the interest in the damages, the chose in action, is the only property which is covered by the policy, consequently that the words of the Act are literally complied with.

We think, therefore, that judgment on these demurrers should be for the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Swinburne & Parker.*

Attorneys for defendants: *Hillyer & Fenwick.*

(1) "Entitled to the property."

1872

J. LOYD
v.
FLEMING.

1872

CORY AND ANOTHER v. PATTON.

Jan. 24.

Marine Insurance—"Slip"—Policy—Concealment of Facts Material to Risk.

Where underwriters have (as by initialing a slip) made a contract of assurance, which, although invalid at law and in equity for want of statutory requisites, is nevertheless, in practice, and according to the usage of those engaged in marine insurance, a complete and final contract binding upon them in honour and good faith whatever events may subsequently happen, the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed.

DECLARATION upon a policy of assurance, whereby the plaintiffs, by their agents, caused themselves to be insured, lost or not lost, at and from Blythe to Port Said, upon any kind of goods and merchandises; and also upon the furniture of and in the ship *Ceylon*. Averments that the defendant subscribed the policy for 80*l.*; that the goods were shipped and were by the perils insured against wholly lost.

Plea: That at the time of the making of the policy of insurance the plaintiffs concealed from the defendant a fact then known to the plaintiffs, and not known to the defendant, and material to the risk, that is to say, that the ship, having set sail and departed on the voyage with the goods on board, had met with an accident and misfortune whilst proceeding on the voyage.

Replication: That before the plaintiffs had any knowledge of the material fact, they being at a distance from the defendant, by a letter written by them to their agent, instructed their agent to effect the insurance, and the plaintiffs had no knowledge of the material fact until after the lapse of a reasonable time for their agent to agree with an underwriter or underwriters to insure the goods, and to settle with him or them the terms and premium on and for which the insurance should be effected; and that in the ordinary course of business their agent ought to have agreed and settled as aforesaid before they, the plaintiffs, knew of the material fact; and that before they knew the fact, the agent did apply to the defendant as such underwriter to insure the goods, and settled and arranged with the defendant the terms and premium on and for which the defendant would insure the same; and

See on an appt. 129 QB 577

the defendant made a parol agreement with the agent to insure the same, on those terms and for that premium, and became in honour, conscience, and good faith, though not in law, bound to subscribe a policy for insuring the goods on those terms and for that premium; and that if the material fact, and the plaintiffs' knowledge of it, and premises aforesaid, had afterwards been made known to the defendant, he would still in honour, conscience, and good faith, have been bound to subscribe and bind himself by such a policy as aforesaid; and that the policy in the declaration mentioned, is the policy which the defendant was so bound to subscribe as aforesaid; and that the plaintiffs, knowing, as the fact was, that in due course of business at the time when they first had knowledge of the said material fact, either a policy for insuring the goods in pursuance of their instructions would be effected, or that such an agreement would be made by some underwriter or underwriters, which would in honour, conscience, and good faith, bind him or them to subscribe a policy for effecting the insurance, did in good faith abstain from communicating the material fact to their agent, or to the defendant, which is the concealment mentioned.

Demurrer and joinder.

1871. Nov. 27. *Watkin Williams*, in support of the demurrer. By the usage of underwriters a slip is deemed to be a moral obligation; but it does not bind the parties at law or in equity. The only legal contract is a policy, and that, in this case, was vitiated by the assured having concealed from the underwriter a material fact which it was their duty to disclose.

[BLACKBURN, J., referred to *Ionides v. Pacific Insurance Co.* (1)]

That case is *primâ facie* adverse; but there the underwriters had by the general character of their undertaking waived all disclosure. In *Duer on Marine Insurance*, vol. ii., p. 410, par. 19, it is said, that if a principal instructs an agent to insure and "subsequently receives intelligence of a loss, or of any event that alters or enhances the risk he desires to be covered, he must be prompt to convey the information, if there is any probability that it will reach the agent in time to prevent the completion or regulate the

(1) Law Rep. 6 Q. B. 674:

1872
CORY
v.
PATTON.

terms of the insurance. His omission to employ for this purpose that due diligence which the law requires, will be deemed a fraudulent and a fatal concealment."

[LUSH, J. The American law does not vitiate an unstamped slip, and that makes a distinction between the doctrines laid down in the text books of that country and our own.]

The effect of the stamp laws here is that there can be no binding agreement until the execution of a policy. In *Mead v. Davidson* (1) a policy executed after loss known to both parties was held good; but Lord Denman, C.J., said that, on authority, "and indeed on the plainest general principles, if the loss had been known to the assured only, the policy would be void." When *Xenos v. Wickham* (2) was decided in the House of Lords, the statutes, then requiring contracts of marine insurance to be in writing and stamped, annulled contracts which were not so, and the slip itself had no binding force; and it was only of avail as a proposal, or an order for a complete contract or policy of insurance. 30 Vict. c. 23, ss. 7, 9, still renders the slip invalid as a contract. (3) Even equity would not give effect to such an instrument: *Ridgway v. Wharton*. (4)

[BLACKBURN, J. But that it is "binding in honour and conscience," is admitted by the demurrer to the replication.]

Mackenzie v. Coulson (5) is directly in point, to shew that the slip cannot be looked at.

Butt, Q.C. (*Hugh Shield* with him), contra. With respect to the course of insurance business in America, "By the usage of all the insurance companies in the city of New York, the application for insurance is made in writing. When it is accepted and the sum

(1) 3 Ad. & E. 303, 308.

(2) Law Rep. 2 H. L. 296.

(3) 30 Vict. c. 23, s. 7: "No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Amendment Act, 1862) shall be valid, unless the same is expressed in a policy; and every policy shall specify the particular risks or adventure, the names of the subscribers

or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes."

Sect. 9: "No policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped."

(4) 6 H. L. C. 238.

(5) Law Rep. 8 Eq. 368.

Port 307

insured, and the rate of premium inserted, it is signed by the applicant and the president of the company, and constitutes a perfect contract." And the usage is similar, "it is believed, in the other States of the Union:" Duer on Marine Insurance, vol. i, p. 107. The passages already cited from the same work obviously refer to the period before any binding contract whatever is made. Here the slip initialed was a contract binding in honour and conscience, according to the practice of underwriters, and nothing which subsequently happened would induce them to decline to execute a policy; therefore the plaintiffs were exonerated from the necessity of disclosing the loss.

[LUSH, J. There is no averment of the usual course of business in the replication.]

The slip is the "complete and final contract between the parties:" *Ionides v. Pacific Insurance Co.* (1) The earlier Stamp Acts are repealed by 30 Vict. c. 23 (2), and by s. 7, no contract or agreement shall be valid unless expressed in a policy. Here it is expressed in a policy, which must be treated as if made on the date of the slip.

[MELLOR, J. The argument is, that when they sign the slip the parties contemplate that all has been disclosed, and that time is the time of the bargain.]

Yes. The policy is often executed a long time after the agreement for it. In fact, insurance clubs, as a rule, never execute a formal policy until there is a dispute, and it is necessary to do so in order that an action may be brought.

Watkin Williams, in reply.

Cur. adv. vult.

Jan. 24. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.) was delivered by

BLACKBURN, J. The declaration in this case is on a marine policy of insurance. The plea is that, at the time of the making of the policy, the plaintiffs concealed from the defendant a material fact, then known to the plaintiffs and not known to the defendant. There is a replication to this plea, to which there is a demurrer, which was argued in the sittings after last Term, before my Brothers

1872
CORY
v.
PATTON.

(1) Law Rep. 6 Q. B. at p. 685.

(2) *Ante*, p. 306, n (3).

1872
CORY
v.
PATTON.

Mellor, Lush, and myself, by Mr. Watkin Williams, for the defendant, and Mr. Butt, for the plaintiffs.

From the statements of counsel, we learned that the replication was intended to confess the plea, and assert, by way of avoiding it, that the plaintiffs had no knowledge of the material fact till after the slip was initialed; and to aver, as a fact, what was assumed in the judgment of this Court in *Ionides v. Pacific Insurance Co.* (1), that "the slip is in practice and according to the understanding of those engaged in marine insurance the complete and final contract between the parties, fixing the terms of the insurance and the premium; and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith;" though for fiscal purposes the legislature have enacted that this contract shall not be enforceable at law or in equity. Some doubt was entertained whether the replication did really raise the question, and leave was offered to the plaintiffs to amend on the usual terms; of which, however, they declined to avail themselves. We think that the replication, as it stands, would be proved by proof of the facts which we have just stated. The practice and understanding of merchants is not a matter of law, and it is open to the defendant at the trial to contend, on the traverse of this replication, that the practice and understanding is not such as is averred; but on this demurrer we must take it to be truly stated, and that being assumed, the question must be determined, whether this excuses the concealment of a fact, which came to the knowledge of the plaintiffs after the execution of the slip and before the policy was made.

Mr. Williams quoted authorities to shew, that the assured must use due diligence to make his agents who are negotiating a policy aware of all material facts which freshly came to his knowledge pending the negotiation; nor do we at all question this doctrine.

On the other hand, it is quite clear that there is no obligation to disclose any matter which first comes to the knowledge of the assured after the policy is made. And we cannot doubt that, if there was a complete contract to execute a policy enforceable in a court of equity (which the slip in *America* appears to be: 1 Duer, p. 107) the court of equity would compel the party to execute the

(1) Law Rep. 6 Q. B. at pp. 684-5.

policy as of the date when he was bound to have executed it, notwithstanding any intervening facts, on the principle that in equity the thing is considered as done when it ought to have been done. See, as to a subsequent fire, *Paine v. Meller*. (1)

1872
CORY
v.
PATTON.

The non-disclosure of a fact after the policy was made in equity, could have no more effect than a similar non-disclosure after it was made in law. The present is an intermediate case, and the question which must now be determined seems to us to be whether, after the negotiation is complete and the contract made, in fact and in good faith, and the underwriter is under a moral obligation to execute a formal policy, the assured is bound by good faith to give information to the assurer of a matter which would make him aware that his bargain was a bad one, information which ought to have no effect on him, but would expose him to a temptation to break his contract, which, as far as the law is concerned, he may do with impunity, because for fiscal purposes the legislature has forbidden the court, either of law or equity, to enforce the contract. To the question thus stated the answer seems obvious, that he is not bound to lead his neighbour into temptation. Until lately, no question of this sort could be raised in any court, for the rules of evidence required that the contract, being written, should be proved by the production of the writing, the slip; and Lord Ellenborough, in *Warwick v. Slade* (2), accurately expressed the effect of the statutes then in force, when he said, "The revenue laws forbid me to look to what is called the slip;" and such continued to be the law down to and after the time when *Xenos v. Wickham* (3) was argued in the House of Lords; and the judges who (on the 8th of May, 1867) gave their opinions, in the House of Lords, used language shewing that they thought that the law was as stated by Lord Ellenborough; and so it was. These passages were quoted and relied on in the argument before us. But in that very year, on the 31st of May, 1867, the 30 Vict. c. 23 received the royal assent. This statute was not brought to the notice of James, V.C., in *Mackenzie v. Coulson*. (4) According to the construction put upon it by this Court, in *Ionides v. Pacific Insurance Co.* (5), that

(1) 6 Ves. 349, 352.

(3) Law Rep. 2 H. L. 296.

(2) 3 Camp. 127.

(4) Law Rep. 8 Eq. 308.

(5) Law Rep. 6 Q. B. 674.

1872

CORY
v.
PATTON.

Act completely changed the law, and repealed all those Acts which had ordered that the slip was not so much as to be looked at in a court of justice, putting it on a footing very similar to that of an unsigned memorandum of a contract within the Statute of Frauds, or a lease for more than three years not under seal, viz., that it was void and not enforceable at law or in equity, but might be given in evidence wherever, though not valid, it was material.

It is open to the defendant, in a court of error, to question the accuracy of the reasoning on which the judgment in *Ionides v. Pacific Insurance Co.* (1) proceeded, but we think that, whilst it stands unreversed, it leads irresistibly to the conclusion that the judgment in the present case should be for the plaintiffs.

Judgment for the plaintiffs.

Attorney for plaintiffs: *J. MacDiarmid.*

Attorneys for defendant: *Ingledew, Ince, & Greening, for Ingledew & Ince, Cardiff.*

1871

Nov. 28.*

SWEETING v. TURNER.

Auction, Sale by—Rent in Arrear, Liability of Auctioneer to pay—Distress on Goods after Sale.

Defendant, an auctioneer, sold certain goods for plaintiff, the owner, on premises occupied by plaintiff and another, and in respect of which the latter owed the landlord rent. By the conditions of sale each lot was to be taken to be delivered at the fall of the hammer, after which time it was to remain at the exclusive risk of the purchaser. After the sale, and before the goods were removed, the landlord threatened to distrain on the goods, whereupon the auctioneer paid the rent, and deducted it from the amount the goods had realized, and paid over the balance to the plaintiff:—

Held, that the auctioneer was not justified, as against the plaintiff, in paying the rent, as, on the sale of each lot, the property passed to the purchaser, who would have had to bear the loss if the landlord had distrained.

CASE stated on appeal from the County Court of Suffolk, holden at Ipswich.

This was an action to recover the sum of 37*l.* 15*s.* 7*d.*

(1) Law Rep. 6 Q. B. 674.

* Decided in Michelmás Term, 1871.

The material facts proved on the hearing were as follows :

On the 1st of September, 1870, the plaintiff and one Matthews entered into partnership as auctioneers, carrying on business upon premises known as the Auction Mart, Upper Orwell Street, Ipswich. The deed of partnership did not contain any arrangement about the rent of the premises, which were then and had previously been in the occupation of Matthews as tenant at a rent of 80*l*. It was afterwards agreed between the partners, but without communicating with the landlord, that part of the rent should be borne by the firm, Matthews paying 20*l*. for that part in his own occupation.

In November, 1870, it was arranged that the partnership should be dissolved and the partnership effects sold; and an authority was given to the defendant, an auctioneer in Ipswich, by two solicitors, on behalf of the partners respectively, to take possession of the stock-in-trade and effects belonging to Messrs. Matthews & Sweeting, and to realize the same with all convenient despatch, and to hold the proceeds as stakeholder until the solicitors should join in directing the disposition thereof.

This authority was drawn up by the two solicitors of the partners, and the defendant was fully aware that he was to take possession of the partnership effects, to hold them against Matthews.

The defendant took possession of the effects, and sold them under printed particulars and conditions of sale, containing, amongst other stipulations, the following :

“Each lot shall be paid for immediately after the sale, and previously to its removal. Each and all lots shall be taken to be delivered at the fall of the hammer, after which time they shall remain and be at the exclusive risk of the purchaser, and the auctioneer shall not be called upon for compensation for any injury or loss sustained after that time.”

After the sale was over, but before all the things had been removed by the respective purchasers, Sidney, the agent of the landlord of the premises, informed the defendant that he could not allow the things to go until he was paid the rent then in arrear. The defendant said he had sold all the things, and could not pay it without some authority, and both Sidney and the defendant went to speak to Matthews, who was on the premises, and

1872

SWEETING
v.
TURNER.

1872

SWEETING
v.
TURNER.

Sidney said that he must distrain unless the rent were paid. Matthews said it had better be paid out of the proceeds of the sale, and asked the defendant to pay it. The defendant, without further inquiry, and without seeing either of the solicitors or the plaintiff, at once said to Sidney he would pay the rent out of the proceeds of the sale, and Sidney went away satisfied.

The rent then due was the private debt of Matthews, and was 40*l.*, for a half year's rent, which was in arrear on the 1st of November, 1870, less certain allowances, which reduced it to 37*l.* 15*s.* 7*d.*, the sum claimed in this action.

The plaintiff having the next day heard of this arrangement warned the defendant not to pay the rent; and a joint direction from the two solicitors was given to the defendant to pay the net proceeds of the sale to the plaintiff.

The landlord's solicitors subsequently gave the defendant an indemnity, and he then paid them the 37*l.* 15*s.* 7*d.*, paying over the balance of the net proceeds to the plaintiff.

The learned Judge gave judgment for the defendant.

The question for the opinion of the Court was, whether, under the circumstances, the defendant was justified in paying the said sum to the landlord. If the Court should be of opinion in the negative, the verdict was to be entered for the plaintiff for the sum claimed.

McKellar and *Graham* for the plaintiff. There was no actual distress, and consequently no such pressure as justified the auctioneer in making the payment. The rent was due from Matthews alone, and the plaintiff was not liable for it, therefore the defendant should have held the proceeds of the sale according to the joint direction. Moreover, the property in the goods had passed to the respective purchasers, and so the plaintiff was not affected by the threat to distrain them, for it is clear law that, even without the express stipulation, on the sale of a specific chattel the property in it passes to the vendee: *Simmons v. Swift* (1); *Dixon v. Yates* (2); Benjamin on the Contract of Sale of Personal Property, p. 218.

Kemplay, for the defendant. The defendant, by his employment as auctioneer, was bound to deliver the goods free from liabilities,

(1) 5 B. & C. 857.

(2) 5 B. & Ad. 313.

and was therefore authorized to release them from this distress, which was as effective as if seizure had taken place; he was therefore justified in paying the rent.

Graham, in reply.

1872

SWEETING
v.
TURNER.

BLACKBURN, J. When once we see the principle to be applied to the facts the case appears plain enough. It is thoroughly established (as the cases cited shew—and there is no case I know of to the contrary) that by the English law, where a bargain and sale is completed with respect to goods, and everything to be done on the part of the vendor before the property should pass has been performed, then the *property* vests in the purchaser, although the vendor still retains his lien, the price of the goods not having been paid; and any accident happening to the things subsequently, unless it is caused by default of the vendor—any calamity befalling them after the sale is completed—must be borne by the purchaser, and, by parity of reasoning, any benefit to them is his benefit, and not that of the vendor. Here the auctioneer had directions and authority to sell these goods, and did sell them under conditions of sale that “each lot shall be paid for immediately after the sale and previously to its removal” (shewing clearly that the vendor’s lien was to be retained); “each and all lots shall be taken to be delivered at the fall of the hammer, after which time they shall remain and be at the exclusive risk of the purchaser.” Words could hardly be more plain to shew that the bargain and sale transferring the property, and, as a legal consequence, also transferring the risk, was to be complete the moment the bargain was struck; and in that respect the case is very like that of *Hinde v. Whitehouse* (1), where sugar was sold by auction on the 20th of September, but remained on the premises where the sale had taken place until the 22nd of September, when an accidental fire there destroyed the goods; and the decision was that they were the buyer’s property and he must abide the loss, and were not the vendor’s, although he still retained his lien. Now here there is not a fire, but a *threat*. After the sale was over—and not till then—and before all the things had been removed by the respective purchasers, the agent of the landlord of the premises stopped the

(1) 7 East, 558.

1872

SWEETING
v.
TURNER.

auctioneer, and said he could not allow the things to go until he was paid the rent then in arrear. The landlord's agent had at that time a legal right to seize the goods for rent in arrear. He did not, however, actually distrain them, for the auctioneer promised to pay the money due for arrears of rent out of the proceeds of the sale; and he now says, "I am entitled to deduct that sum out of the proceeds of the sale of the goods, because if I had not prevented the distress, the loss by the distress would have fallen on the vendors, my clients." But I think there the auctioneer made a mistake; for if the threat to distrain had been executed it would have been, like an accidental fire, a calamity falling on the goods after the sale, and as it was no fault on the part of the auctioneer or his client that the rent of the premises was still in arrear, the calamity would have been one for which they were by no means to blame, but the purchaser, whose goods had been seized would have had to bear the loss. When once we understand that the loss would have fallen on the buyers of the goods had they been distrained, it is evident that it would have been a loss not sustained by the auctioneer or his employer, the plaintiff; consequently the promise of the auctioneer, although one that it was natural for him to give, was really made in order to save damage, which would not have befallen his client, but another person; therefore I think he had no authority, either express or implied, from the plaintiff, to make such a promise, and that the plaintiff is entitled to recover.

I may observe, that if the threat to distrain had been uttered *before* the sale, I should be very much inclined to think that the auctioneer would have been acting within his authority in making such a contract to prevent the loss which the distress would have caused to his client; but as it happened *after* the sale I am of opinion that he could have no such authority at all, and consequently that the judgment must be reversed.

MELLOR, J. I am of the same opinion. I think that the auctioneer mistook his real position. No doubt, thinking rightly that, as the rent was due, the threatened distress would be good, the auctioneer promised to pay the rent if the distress were not enforced, and in all probability had that claim been made before

the sale he might have been justified in the course he pursued. But unluckily it was *after* he had sold the goods that the agent of the landlord stopped him and said he could not allow the things to go until the rent then in arrear was paid. The auctioneer said, "I have sold the goods and cannot pay it," but under the stress of the agent he undertook to pay the rent. As, however, the threatened goods were not the property of his client, the payment ultimately made was really made on behalf of the purchasers. So, having thus acted under a mistaken impression, the defendant must be held responsible for the money.

1872

SWEETING
v.
TURNER.

LUSH, J. I am of the same opinion. The question is, whether the auctioneer had the authority of those who employed him to pay this sum for rent out of the proceeds of the sale. Express authority it is clear he had none; on the contrary, his instructions were to sell and hold the proceeds as the agent of his employers. Then had he any authority arising out of the circumstances? The paying this money was not necessary to enable him to fulfil the sale, for the sale had been made, the property in the goods had passed to the buyers, and there was nothing more for the auctioneer to do but to receive the money and hand over the goods. I cannot, therefore, think that he was impliedly authorized by the necessity of the case to promise or make the payment.

Judgment for the plaintiff.

Attorney for plaintiff: *E. Sweeting.*

Attorney for defendant: *R. C. Cobbold.*

1872

Feb. 16.

[IN THE EXCHEQUER CHAMBER.]

DENNETT v. ATHERTON.

Landlord and Tenant—Covenant for quiet Enjoyment—Restriction by Covenant of Lessor as to particular Trade.

16/12/84
27/1/84

On a conveyance of land to defendant in fee, defendant covenanted with B., the vendor, that defendant and his assigns would not permit to be carried on in any building built on any part of the land the trade of a seller of beer. Defendant afterwards demised for twenty-one years a building on part of the land, which at that time was used as a grocer's shop; the lessee covenanted that he and his assigns would not carry on therein, or permit to be carried on, certain trades (that of a seller of beer not being one); and defendant covenanted that the lessee and his assigns should peaceably enjoy the demised premises without any lawful let, suit, or interruption by or from defendant or any person lawfully claiming from, by, or under him. This lease was assigned to plaintiff; and he, without notice of defendant's covenant with B., altered and fitted up the premises as a beer-shop, upon which B. obtained an injunction from the Court of Chancery restraining plaintiff from carrying on the trade of a beerhouse on the premises. Plaintiff then brought an action against defendant for a breach of the express or of an implied covenant in the deed of demise:—

Held, affirming the judgment of the Court of Queen's Bench, that the express covenant for quiet enjoyment excluded any implied covenant; and that that covenant did not amount to a warranty to the lessee that he might use the premises for any purpose not mentioned in the restrictive covenant on his part; and therefore, that plaintiff could not recover.

Spencer v. Marriott (1 B. & C. 457; 2 D. & Ry. 665) affirmed.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the plaintiff.

The action was brought to recover damages against the defendant for the breach of certain covenants, expressed or implied in a lease granted by the defendant to one Thomas Rawlings and his assigns, the residue of which lease became vested by divers mesne assignments in the plaintiff.

The defendant purchased the freehold of the demised premises, and they were conveyed to and vested in him by an indenture of 29th April, 1861, between James Bell, of the one part, and the defendant of the other part, whereby Bell conveyed certain pieces of land to the defendant in fee; and after reciting that the pieces of land were two several plots of ground intended to be built upon and to form one line of frontage in Ellesmere Street, and that in

the treaty for the purchase it was agreed that the defendant should enter into the covenants next mentioned, the defendant, "in pursuance of the said agreement, and with the intent to bind the hereditaments hereby conveyed, and the successive owners and occupiers thereof, for himself, his heirs, executors, administrators, and assigns, doth covenant, promise, and agree to and with the said James Bell, his heirs and assigns, that, if at any time hereafter the defendant, his heirs, executors, administrators, and assigns shall build upon the said pieces of ground hereby granted and released, they shall erect such building so as not to project beyond, but range within the frontage lines of Ellesmere Street" and other streets named therein; "and further, that the defendant, his heirs, executors, administrators, and assigns shall not, nor will carry on, or permit, or suffer to be carried on on the pieces of ground hereby granted, or any part thereof, or any building to be erected thereon, the trade or business of a seller of beer, or spirits, or wine, or any noisome or offensive trade, either wholesale or retail, which may be an annoyance or damage to the neighbourhood in which the said pieces of land are situate."

By indenture of the 14th of August, 1863, the defendant "demised" to Thomas Rawlings and his assigns the premises, situate in Ellesmere Street, Poplar, in the county of Middlesex, for the term of twenty-one years, from the 24th of June, 1863, at the yearly rent of 32*l.*, payable as therein mentioned. And Rawlings, for himself and his assigns, covenanted to pay the said rent, "and further, that he and his assigns would not, during the aforesaid term, use, exercise, or carry on, or permit, or suffer to be used, exercised, or carried on, in or upon the said demised premises the trade or business of a butcher, baker, dyer, smith, farrier, pipe-maker or burner, distiller, tallow-chandler, soap-boiler, tripe-dresser or seller, or any noisy, noisome, dangerous, or offensive trade, art, or business whatsoever, without the licence or consent in writing of the defendant for that purpose first had and obtained." And the defendant covenanted with Rawlings and his assigns "that he and they, paying the rent hereby reserved in manner herein mentioned, and observing, performing, and keeping all and singular the lessee's covenants, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy all and singular the said demised

1872

DENNETT
v.
ATHERTON.

1872

DENNETT
v.
ATHERTON.

premises with their appurtenants during the said term hereby granted without any lawful let, suit, trouble, denial, interruption, molestation, or disturbance whatsoever, of, from, or by the defendant, his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from, under, or in trust, for him, them, or any of them."

The premises, at the time of the granting of the above lease, in 1863, were used as a grocer's shop, but shortly before the assignment to the plaintiff they were denuded of all internal fittings and were unused.

By various mesne assignments the unexpired term and residue of the lease became vested in the plaintiff by deed of the 11th of November, 1868.

The plaintiff entered on the premises, and finished a cellar which had been commenced by his immediate assignor, and expended money in altering and fitting up the premises as a shop for the sale of beer by retail, and the plaintiff, after the alterations were completed in December, 1868, opened the premises for the sale of beer by retail.

About the 5th of December, 1868, Mr. Bell, who had granted the premises to the defendant, gave notice to the plaintiff and to the defendant that the trade or business of a seller of beer, spirits, or wine, either wholesale or retail, should not be carried on in the premises contrary to the covenant of the defendant contained in the indenture of the 29th of April, 1861. This was the first intimation the plaintiff had of the existence of any such covenant, and he had no previous notice or knowledge of it.

On the 14th of January, 1869, the plaintiff was served with an injunction from the Court of Chancery restraining him from carrying on the trade of a beerhouse keeper or seller of beer by retail or otherwise on the premises. The costs of Bell in the Chancery suit were taxed at 63*l.*, which the plaintiff has been compelled to pay.

The present action was then brought.

The declaration set out the indenture of lease, and, in addition to the express covenant by the defendant for quiet enjoyment, alleged that the defendant, by the said indenture of demise, covenanted that he had good right and full title to demise and let the therein-mentioned premises for the term and purposes and

subject to the covenants in the said deed mentioned and according to the tenor and purport thereof, and that he, the defendant, had not been party or privy to, or done or committed any act, matter, or thing, whereby, or by reason whereof he, the defendant, was hindered or prevented from demising or letting the aforesaid premises for use by Rawlings and his assigns as a beershop. That the residue of the lease became ultimately vested in the plaintiff by deed of the 11th of November, 1863, and the plaintiff entered on the premises and expended money in fitting them up as a beershop. It then averred performance of all covenants and conditions precedent, and assigned as breaches of the express covenant and of the alleged implied covenant, that the defendant never had any title to demise the premises in the terms he had done; and that he had been privy to acts by which he was prevented from so demising. It then set out the covenant by the defendant in the deed of the 29th of April, 1861, and averred that the plaintiff, as assignee of the defendant, was bound by it; and that the plaintiff had no knowledge of this covenant. That Bell, claiming and possessing right and power through the acts and agreements of the defendant, and to which he was privy, compelled the plaintiff by injunction in Chancery not to carry on the business of a beer seller on the premises, or commit any breach of the defendant's covenant in the deed of 1861; whereby the plaintiff was put to divers costs and losses.

Plea: Non est factum.

At the trial a verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff.

A rule was accordingly granted on the ground that, on the above facts, the plaintiff was entitled to recover, and that there was evidence of the covenants both express and implied as averred in the declaration.

The Court of Queen's Bench discharged the rule on the 14th of May, 1870, on the authority of *Spencer v Marriott*. (1)

1871. June 14. *J. Brown, Q.C. (Philbrick with him)*, for the plaintiff. The declaration alleges two breaches, one of the express covenant for quiet enjoyment, and the other of an implied

1872
DENNETT
v.
ATHERTON.

1872

DENNETT
v.
ATHERTON.

covenant; but, on the authorities, it must be conceded that where there is an express covenant in a lease, no other covenant for title or quiet enjoyment can be inferred. The plaintiff, therefore, must rely solely on the express covenant that the lessee and his assigns should enjoy the demised premises without lawful let, suit, or interruption by or from the defendant or any person lawfully claiming by, from, or under him. In addition, however, to this covenant, there is in the lease a covenant by the lessee against carrying on certain trades, that of a beerhouse not being one of them. The defendant, unknown to the plaintiff, had, on the conveyance of the land to him in fee, covenanted with Bell, the vendor, that the trade of a beershop should not be carried on in any part of the premises. The effect of such a covenant is to bind a lessee in equity: *Tulk v. Moxhay* (1); even without express notice: *Wilson v. Hart* (2); and, accordingly, in the present case, the plaintiff was forced to submit to a decree prohibiting the use of the premises as a beershop. The plaintiff having been disturbed in the full enjoyment of the premises by being thus prevented from carrying on a lawful trade, and one not within his own restrictive covenant, by reason of the covenant of the defendant, the question is, whether the defendant has not been guilty of a breach of his covenant for quiet enjoyment. The Court of Queen's Bench acted upon *Spencer v. Marriott* (3), as a direct authority in the defendant's favour; and at first sight it seems to be so, but on examining the report in *Dowling and Ryland*, which is fuller than in *Barnewall and Cresswell*, it appears clearly distinguishable from the present case. That was an action for a breach of the covenant for quiet enjoyment by reason of the plaintiff, a sub-lessee of Mrs. Marriott, having been ejected on a forfeiture for the breach of a covenant in the lease under which Mrs. Marriott held, in converting the premises into a shop. But it appears, from the report in *Dowling and Ryland*, that Mrs. Marriott was not the original lessee, but only the assignee of the lease granted to one Layton: so that Mrs. Marriott had not herself covenanted, and the breach alleged was the non-disclosure to the plaintiff of the covenant in the original lease; and it was clear, therefore, that no act of

(1) 2 Phill. 774; 18 L. J. (Ch.) 83.

(2) Law Rep. 1 Ch. Ap. 463. *12 Jur.*

(3) 1 B. & C. 457; 2 D. & R. 665.

hers was the cause of the eviction. Here, Atherton himself covenanted with Bell, and did what was equivalent to charging the land with a servitude or easement. In *Wickham v. Hawker* (1) a reservation of game by the grantor of an estate was held to be a re-grant by the grantee. But this is a still stronger case, for here there is the creation of a right which never existed before, and that right was created by the covenant of Atherton himself. In 2 Sug. V. & P., at p. 512 (10th ed.), it is said: "Whatever opinion may anciently have been entertained, it is now clear that a suit in equity, by which the purchaser is disturbed, is within a covenant for quiet enjoyment against disturbances generally." The author then proceeds, at p. 514: "In respect to the persons against whose acts limited covenants will extend, it seems that a covenant for quiet enjoyment against A. and any other person by his means, title, or procurement is broken by the entry of a person in whose name he purchased jointly with his own name:" citing *Butler v. Swinnerton*. (2) "In this case Mr. Justice Doddridge put many cases. If a tenant in tail, to whom the tail was made, makes an estate and covenants as before, and the issue ousts the covenantee, the covenant is broken, because, being his purchase, the descent to his issue is by his means, although not by his title." That is only because the tenant in tail took the conveyance to himself in tail, and it is precisely analogous to the present case. "But if the issue make an estate and covenant, and the issue of the issue enter, it is not broken, because they are not in by his means, but by descent. But if there be a lessee for life, remainder over, and the lessee make an estate and covenant and die, and he in remainder enter, it is not broken, because he is in by the feoffor, not by the lessee. But if a man enfeoff upon condition to be enfeoffed for life, and remainder over, then it shall be otherwise, because by his procurement and means; et sic de similibus." The above distinction precisely touches the present case; it is by Atherton's means that Bell obtained the injunction, which he could not have got had not Atherton made the covenant to him; and it distinguishes this case from *Spencer v. Marriott* (3), for there Mrs. Marriott, the defendant's lessor, was not a party to the lease from the Found-

1872

DENNETT
v.
ATHERTON.

(1) 7 M. & W. 63.

(2) Palm. 339.

(3) 1 B. & C. 457; 2 D. & R. 665.

1872
 DENNETT
 v.
 ATHERTON.

ling Hospital. Lord St. Leonards proceeds (p. 515), still citing from Doddridge, J.: "So if A. covenant for quiet enjoyment against all claiming by, from, or under him, a claim of dower by his wife is within the covenant." . . . Lord St. Leonards then cites *Spencer v. Marriott* (1), and then proceeds. "A covenant for quiet enjoyment against A., or any person claiming under him, extends to a person deriving title under an appointment made by A., by virtue of a power in the creation of which he concurred, although the estate did not move from A., and the estate of the appointee is, according to the general rule, considered as limited to him by the deed creating the power. This was settled in *Hurd v. Fletcher*." (2) This is very analogous to the present case. After stating the facts of that case, Lord St. Leonards, at p. 516, proceeds: "It may be proper to mention that the case of *Butler v. Swinnerton* (3), which (to borrow an expression of Lord Kenyon's) is the magna charta of the liberal construction of covenants for title, is also stated in Shep. Touch. 171, which goes on to state, 'and so it is also, if A. purchase land of B., to have and to hold to A. for life, the remainder to C. the son of A. in tail, and after A. doth make a lease of this land to D. for years, and doth covenant for the quiet enjoyment, as in the last case, and then he dieth, and then C. doth oust the lessee; in this case this was held to be *no* breach of the covenant;' and for this proposition *Swan's Case*, M. 7 & 8 Eliz., is cited, and no reference is made to any other report of the case. Now this case, as it stands in Shep. Touch. (a book of acknowledged authority), is in direct opposition to the decision in *Butler v. Swinnerton* (3); but from other reports of *Swan's Case* (4) it appears there was no actual covenant in the lease, but merely a covenant in law, in the words 'concessit et demisit,' and therefore the judges thought the action did not lie, because the covenant determined with the estate of the lessee." (5) It is, therefore, clear that Lord St. Leonards thought *Butler v. Swinnerton* (3) right, and *Swan's Case*, as stated in Shep. Touch., wrong. *Calvert v. Sebright* (6)

(1) 1 B. & C. 457; 2 D. & R. 665.

(2) Doug. 43.

(3) Palm. 339; Cro. Jac. 656.

(4) Moo. 74; Dyer, 257; Bendl. 150; And. 12.

(5) In the report of *Swan's Case*,

nom. *Swan v. Stransham*, in Dyer, 257, the judges are reported to have said, "If it had been a covenant in fact or expressed, or warranty of the term expressed, it would be otherwise."

(6) 15 Beav. 156.

is very similar to *Hurd v. Fletcher*. (1) There it was sought to charge the estate of the testator in respect of an alleged breach of a covenant in a lease for three lives granted by him, whereby he covenanted for quiet enjoyment during the three lives "without any let, suit, interruption, or disturbance of or by the testator, his heirs or assigns, or any other person claiming by, from, or under him." It appeared that the father of the testator being seised in fee of the estate, it was conveyed to such uses as the testator and his father should jointly appoint; upon the testator's marriage the joint power was executed by him and his father, whereby the estate was appointed to trustees, to convey to the father for life, remainder to the testator for life, with remainder to the testator's first and other sons in tail, with power of leasing for twenty-one years; the estate was conveyed accordingly, and after the father's death the testator granted the lease in question; and afterwards by deed between him and his eldest son the estate was conveyed to such uses as they should appoint, and in default to the testator for life, remainder to his son in fee; and on the death of the testator the son ejected the lessee; and it was held by the Master of the Rolls that there had been a breach of the covenant for quiet enjoyment, for that the son claimed under the testator within the meaning of the covenant. In *Carpenter v. Parker* (2) the defendants, the trustees under the will of the defendant's father, at the request of the defendant, created a term and assigned it by way of mortgage, with power to the defendant, with the mortgagee's consent, to lease. The defendant leased, without the mortgagee's consent, to the plaintiff, who was afterwards obliged to give up possession to the mortgagee; and it was held that this was a breach of the covenant in the lease by the defendant for quiet enjoyment without let, suit, eviction, or molestation by the defendant or any one claiming under him. There, it is to be observed that the defendant had no legal estate whatever, and that the estate was conveyed by the trustees, who had the legal estate, to the mortgagee. The above cases abundantly shew that it is not necessary that the person, in order to "claim by, from, or under the defendant" within the terms of the present covenant, should take any estate through the defendant, it

1872

DENNETT
v.
ATHERTON.

(1) Doug. 43.

(2) 3 C. B. (N.S.) 206; 27 L. J. (C.P.) 78.

1872

DENNETT
v.
ATHERTON.

is sufficient if the right or power to disturb the possession is taken under a deed to which the defendant is a consenting party; it is an *à fortiori* case, where the defendant himself creates the restrictive power or right by his own covenant. This consideration at once removes the case from within the authority of *Spencer v. Marriott* (1), for here it is clear that Bell claimed through the defendant, his covenant alone enabling Bell to obtain the injunction.

Prentice, Q.C. (*Finlay* with him), for the defendant. It is not now contested by the plaintiff that any implied covenant for title or quiet enjoyment is cut down by the express covenant; and *Jackson v. Cobbin* (2) is a direct authority that a covenant on the part of the lessor, that he had power to let the premises without any restriction as to the purpose for which the premises may be used, cannot be implied from the mere demise of the premises; nor can the covenant by the plaintiff, that he will not carry on certain trades, be construed to imply, on the part of the defendant, that the plaintiff may carry on any other lawful trade on the premises. The question must turn on the express covenant; and that is not for title, or that the defendant has not encumbered, but simply for quiet enjoyment without interruption from the defendant, and all claiming from, by, or under him. There being, therefore, no covenant by the defendant, either express or implied, that the plaintiff might use the premises as a beershop, there has been no breach of covenant by the defendant. The act which brought this injunction on the plaintiff, was an act done by the plaintiff himself, viz., the conversion of the shop into a beershop. And this is the ground of the decision in *Spencer v. Marriott*. (1) The facts as stated in the declaration are given more fully in *Dowling and Ryland* than in *Barnewall and Cresswell*; but the ground of decision of the Court is precisely the same in both reports, viz., that the forfeiture had not been brought about "by or through the acts, means, or procurement of Mrs. Marriott" (the plaintiff's lessor). "The source of the injury," says Bayley, J., "was the conversion of the dwelling-house into a shop, and this conversion was the act, not of Mrs. Marriott, but of the party in possession." (3) There

(1) 1 B. & C. 457; 2 D. & R. 665.

(2) 8 M. & W. 790.

(3) 2 D. & R. at p. 669.

is no hardship on the plaintiff in thus holding. If he wanted to convert the shop from the state in which it was when he took the lease, he should either have made inquiry and investigated the title, or obtained an express covenant from the defendant that he might use it as a beershop. In *Wilson v. Hart* (1), Turner, L.J., says: "It cannot, I think, be denied, that, generally speaking, a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; nor can it, I think, be disputed that this rule applies to the purchaser or mortgagee of leasehold estates as much as it applies to the purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years." The plaintiff here must, therefore, be taken either to have notice of this covenant, or it is his own laches that he did not acquire the knowledge. It may be as well to add that *Spencer v. Marriott* (2) is recognized as an authority in all the text books: Sugden's V. & P. (14th ed.), p. 602; Dart's V. & P. (4th ed.), p. 717; 4 Jarman's Conveyancing (3rd ed.), p. 393; Woodfall's Landlord and Tenant (10th ed.), pp. 569, 675.

Philbrick made no observations in reply.

Cur. adv. vult.

Feb. 16. The judgment of the Court (Kelly, C.B., Martin, Channell, and Cleasby, BB., Willes, Byles, and Keating, JJ.) was delivered by

WILLES, J. (3) This was an action for breach of a covenant for quiet enjoyment, alleged to be expressed or implied in a lease of a house, which was used as a grocer's shop when let, and which the tenant turned into a beerhouse. The alleged breach consisted in a decree in a Chancery suit, founded upon a covenant by the lessor with the person from whom he obtained the property, that the house should not be used as a beerhouse; by which decree the tenant was restrained by injunction from so using it, and lost his expenses, profits, and costs.

The foundation of this decree was that the Court of Chancery imputed to the tenant a constructive knowledge of the title of his

(1) Law Rep. 1 Ch. Ap. at p. 467.

(3) The judgment was read by

(2) 1 B. & C. 457; 2 D. & R. 665. Cleasby, B.

145C 12 Jan 25 460² A

1872
DENNETT
v.
ATHERTON.

landlord and the restraint upon him, upon the ground that he need not have become tenant without investigating the title, and that having done so he could claim no greater right than his landlord. (1) Whether this extension of restrictions upon the use of property other than in leases, be sound or not, it is not for us to determine. At the common law the benefit of covenants made upon a purchase runs with the land, but not the burthen, except in the case of a lease, when the assignee would, as a matter of course, refer to the lease itself, and find the restriction set down. We must take it, however, as established that the Court of Chancery has imposed this new burthen upon the use of property, and that its authority has been lawfully exercised in the present case.

The question, therefore, is whether a decree in Chancery, restricting a particular use of the land by reason of a covenant of the lessor, but not otherwise interfering with the title, be a breach of the covenant for quiet enjoyment.

In deciding this we must remember that there is no suggestion of fraud, and that the covenant must have the same effect in the case of a tenant who knew as in the case of a tenant who did not know of the restriction. All the argument upon the hardship of the case is therefore irrelevant.

Now, there can be no doubt that a proceeding of the Court of Chancery, or of a Court of Common Law, interfering with the title and possession of the land, does amount to a breach of the covenant for quiet enjoyment: as in case of dower, common, rent, or such like: *Calthorp v. Heyton* (2); *Hunt v. Danvers*. (3) On the other hand, it has long been settled that such a proceeding, interfering only with a particular mode of enjoyment of the land, or part of it, but not with the title or possession, is not a breach: *Morgan v. Hunt*. (4)

The covenant for quiet enjoyment, whether with or without a partially restrictive covenant, has, therefore, been regarded as a covenant to secure title and possession, and not to guarantee to the tenant that he may lawfully use the land for any purpose not in the restriction.

(1) See *Wilson v. Hart* (Law Rep. 1 Ch. Ap. 463.)
(2) 2 Mod. 54. (3) T. Raym. 370. (4) 2 Vent. 213.

12 Jan 25 46

To give it a wider effect might involve some strange consequences. If a seller or lessor had worked out mines, and the purchaser or lessee were to build a house, which sunk into the old workings, here would be a breach at once. In other words, a warranty would be read in, that the land was capable of being used for any purpose or for any purpose not expressly excluded. This would be a novelty in itself, and inconsistent with the settled rule, that a covenant for quiet enjoyment excludes all inferences of an implied covenant for title, which, in the absence of an express covenant however limited, possibly the word "demise" might be relied upon to raise, notwithstanding the statute (1): *Noke's Case*. (2)

For these reasons we think *Spencer v. Marriott* (3),—where an expulsion by the head landlord for breach by an act of the under-lessee of a covenant in the head lease as to the use of the premises, of which the under lessee had no notice, was held to be no breach of a covenant for quiet enjoyment in the under lease, and which case this appeal seeks, in effect, to overrule,—was rightly decided, according to the established course of precedents, and that there is no ground in reason for setting it aside.

The judgment must, therefore, be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Loxley & Morley*.

Attorney for defendant: *R. Wilson*.

(1) Quære, 8 & 9 Vict. c. 106. s. 4.

(2) 4 Rep. 80 b.

(3) 1 B. & C. 457; 2 D. & R. 665.

1872
Jan. 24.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF WOLVERHAMPTON, RESPONDENTS *v.* CASSWELL, APPELLANT.

Market Tolls, Non-Rateability of—Tolls for Cattle coming into a Market-place.

Tolls, authorized to be taken by an Act of Parliament, in respect of cattle brought into a market for sale, which become due as soon as the cattle are brought into the market-place, and before the cattle are put into a pen or tied up, are mere market tolls, and not in the nature of stallage or tolls taken in respect of the use of the soil; and in assessing the lessee of the market and tolls to the poor-rate, in respect of his occupation of the market-place, such tolls cannot be taken into account as enhancing the value of the occupation.

ON APPEAL against a poor-rate for the parish of Wolverhampton, the Wolverhampton Quarter Sessions affirmed the rate subject to a case.

The corporation of Wolverhampton, as the local board of health, are possessed of an enclosed market-place, situate in Cleveland Road and Bilston Street, Wolverhampton. By the Wolverhampton Improvement Act, 1853, the local board had power to maintain markets and to levy tolls, as in the schedules to that Act annexed, and also power to grant leases of the markets, market-places, tolls, &c., for any period not exceeding seven years. In 1868 they leased the cattle and pig market (being the enclosed market-place above mentioned) to the appellant, and the tolls as then existing or thereafter altered for the term of five years.

In schedule C of the Act the tolls are all termed "cattle market tolls," and are of three classes—one class for animals brought into the market-place for the purpose of sale, and another class for animals placed under covered spaces or in pens or sheds in the market-place, and a third class for animals remaining at night in the market-place.

The Act was repealed by the Wolverhampton Improvement Act, 1869 (32 & 33 Vict. c. cxxxi.). By s. 410 of the new Act, all leases, &c., under the repealed Act, are to continue valid. By s. 193, the corporation have power to continue and establish markets and fairs, and, inter alia, "the cattle market and fat pig market" before mentioned, and "may demand and receive tolls, stallages, and rents," as specified in the 7th schedule to the Act.

By s. 194 it is declared that the limits of the markets and fairs of the corporation shall be the same as the limits of the borough. By s. 200 sales of cattle, except in the cattle market, are prohibited under a penalty. By ss. 202 and 203 the tolls in the markets and fairs in respect to the occupation of stalls, &c., or of articles sold, are payable not only by the original taker or seller, but also by any subsequent taker or seller during the same day.

By s. 204 "the tolls in respect of cattle brought to the market for sale, shall become due as soon as the cattle in respect whereof they are demandable are brought into the market-place and before the cattle are put into any pen or tied up in such market-place; and if the cattle be not removed within one hour after the close of the market another toll shall become due in respect of the cattle so omitted to be removed."

By Table F. in the 7th schedule the payments for bringing cattle into the market are termed "cattle market tolls," and the other payments are termed respectively "shed and pen rents" and "lodging rents." The cattle market tolls are: for every horse or mule under 13 hands, 4*d.*, above 13 hands, 6*d.*; for every foal, ass, or calf, 2*d.*; for every bull, cow, steer or heifer, 4*d.*; for every sheep, lamb, or goat, 1*d.*; for every pig not exceeding 20 lbs., $\frac{1}{2}$ *d.*; exceeding 20 lbs. and not exceeding 200 lbs., 1*d.*; exceeding 200 lbs., 2*d.*

By the rate appealed against the appellant is rated as "the occupier of the cattle and pig market."

The estimated area is stated in the rate to be 3*a.* 2*r.* 25*p.* the gross estimated rental as 1100*l.*, and the rateable value as 880*l.*

The sole question on appeal was whether the first class of "cattle market tolls," received by the appellant for cattle brought into the market-place for the purpose of sale, may be taken into account in estimating for the purpose of the rate the yearly value of the appellant's occupation of the market-place.

On the part of the appellant it was contended that the toll in question was an incorporeal hereditament, and did not arise by virtue of any occupation of the soil. On the part of the respondents it was contended that, although the toll per se might not be rateable, yet as the appellant was rated for the market-place, and the toll taken within the market-place enhanced the value

1872

THE QUEEN
v.
CASSWELL.

1872
THE QUEEN
v.
CASSWELL.

of the occupation to the appellant, it should be taken into account in estimating the rateable value of the market-place.

If the Court should be of opinion that such tolls may be taken into account in estimating such rateable value, the judgment of the quarter sessions was to stand confirmed; but if the Court should be of a contrary opinion, the rate was to be reduced to 275*l.* 15*s.*, as the gross estimated rental, and to 220*l.* 15*s.* as the rateable value.

J. O. Griffiths (*Gane* with him), for the respondents. It is not contended that these tolls can be rated per se, but the occupation of the market is enhanced in value by the power of taking these tolls, and a larger rent is obtainable accordingly, and the appellant ought to be rated at the enhanced value: *Reg. v. North and South Shields Ferry Co.* (1); *Earl of Durham v. Bishopwearmouth* (2); *Reg. v. Rhymney Ry. Co.* (3); *New Shoreham v. Lancing*. (4) The case of *Roberts v. Aylesbury* (5) will be relied upon for the appellants; but it is distinguishable: there the tolls were taken for goods exposed for sale within the ambit of the market, but really in the public streets; here the tolls are for cattle entering the market-place the soil of which is vested in the appellant as occupier. Again the late case of *Mayor of London v. St. Sepulchre* (6) will be relied upon; but in that case the tolls were for provisions carried into the market which could not be said to occupy the soil; and here the cattle just as much occupy soil as if they were stalled.

Poland (*Bosanquet* with him), for the appellant. *Mayor of London v. St. Sepulchre* (6) is directly in point; s. 36 of the London Act is in precisely similar language to s. 204 of the present Act. [He read the judgments of Cockburn, C.J., and Blackburn, J., from a MS. note given at the end of this case.] As to the distinction attempted, that in the one case the toll was for meat and provisions, whereas the toll here is for live cattle, the two classes of tolls are not distinguishable, both being for mere admission into the market, not for the use of the soil; and the

(1) 1 E. & B. 140; 22 L. J. (M.C.) 9.

(2) 2 E. & E. 230; 23 L. J. (M.C.)

232.

(3) Law Rep. 4 Q. B. 276.

(4) Law Rep. 5 Q. B. 489.

(5) 1 E. & B. 423; 22 L. J. (M.C.)

34. 17 *Jan* 236.

(6) See note at the end of this case.

145c 17 *Jan* 187.

two cases were assimilated, in *Mayor of Yarmouth v. Groom* (1), by Martin, B., who says, that if a person carried goods in a basket into a market for sale and happened to place the basket on the ground, "such a use of the ground would not be stallage. It would be nothing more than using the market for hawking, and it might as well be said that cattle in a market, which it is impossible to keep stationary, have an exclusive occupation of one spot of ground, and therefore stallage is payable in respect of them." In *Rex v. Bell* (2), which is one of the earliest cases in which this distinction between market tolls and stallage was acted upon as to rating, it was held that a toll taken for every sack of corn placed on the ground and exposed for sale was not rateable. In *Mayor of Northampton v. Ward* (3) the same distinction had been taken, and the distinction has ever since been adhered to. [He was then stopped by the Court.]

1872

 THE QUEEN
v.
CASSWELL.

COCKBURN, C.J. I am of opinion that this toll, payable for the admission of cattle into the market, is not properly the subject of a rate. The distinction between market tolls and stallage has been long taken and established; though it is, in my opinion, to be regretted; for a man, who occupies the soil of a market with the occupation enhanced in value by reason of this toll, ought to be assessed to the rates and contribute to the public local burthens in proportion to the value of his occupation. But we must abide by the distinction founded on this principle of ancient law, and take it as established that tolls payable merely as market tolls for the use of the market are not rateable, whereas the toll paid for the use of a stall which occupies the soil is rateable. The present toll is payable, not for the use of any shed or other thing erected or maintained upon the soil, but independently of anything in the shape of stalls or sheds, simply for admission to the market-place; and it is therefore a market toll, and comes within the distinction and is not rateable.

BLACKBURN, J. I am of the same opinion. In *Mayor of London v. St. Sepulchre* (4) I pointed out that the distinction to which

(1) 1 H. & C. 102, 111; 32 L. J. (Ex.) 74, 78.

(2) 5 M. & S. 221.

(3) 1 Wils. 107.

(4) See note at the end of this case.

1872

THE QUEEN
v.
CASSWELL.

my Lord has adverted was not very intelligible, and that the legislature might well have abolished it when granting these new tolls. In that case the question was whether, upon the construction of the London Act, it was the intention of the legislature to make the tolls for commodities brought into the market a mere franchise, and not tolls in respect of the use of the land so as to be rateable. The sections of that Act, which enabled the appellants to levy the tolls, were essentially identical in terms with s. 204 of the present Act, the only distinction is that there the tolls were leviable in respect of provisions brought into the market, here they are in respect of live cattle and pigs; but the principle of the decision in that case, that they were "market tolls," and so not rateable, makes it directly in point, and I cannot see any distinction between the two cases; on the contrary, I agree with what Martin, B., said in *Mayor of Yarmouth v. Groom* (1), that live animals simply driven into a market, and not stalled, cannot be said to occupy the soil any more than a living person who walks into the market carrying provisions. I may observe that a toll of a halfpenny is imposed by the table of these "cattle-market tolls" on every pig not exceeding twenty pounds weight; this would apply to sucking pigs which would be carried and not driven into the market. I am clearly of opinion, therefore, that these tolls are "market tolls" precisely the same as the tolls in *Mayor of London v. St. Sepulchre* (2), and therefore cannot be taken into account in rating the market-place.

LUSH, J. I am of the same opinion. The question is whether these "cattle market tolls" are a payment for the use of the market only, or for the use of the soil. I think, for the reasons already given, they are the former.

Judgment for the appellant; rule to be amended accordingly. (2)

Attorneys for appellant: *Pearce & Son, for Wilkinson & Gillespie, Walsall.*

Attorneys for respondents: *Robson, Tidy, & Herbert, for Horatio Brewitt, Wolverhampton.*

(1) 1 H. & C. at p. 111; 32 L. J. (Ex.) at p. 78.

(2) See note on the following page.

Q.B., May 27, 1871. *Mayor, &c., of London, Appellants; Overseers of St. Sepulchre, London, Respondents.*

1872

THE QUEEN

v.

CASSWELL.

Case stated under 12 & 13 Vict. c. 45, s. 11.

The corporation of London, under 23 & 24 Vict. c. xciii., built a market-house, shops, and stalls for the sale of provisions on a piece of ground, and constructed streets and approaches to the market. The soil of the ground, the market-house and stalls, and the streets were vested in them. Under s. 32 they were empowered to levy certain tolls in respect of all meat, poultry, and other provisions brought into the market, which, by s. 36, "shall become due and payable immediately on the meat or poultry or other provisions in respect of which such tolls are to be taken entering or being brought into the said market from any person bringing the same or causing the same to be brought into the market."

The occupiers of the shops, stalls, standings, sheds, buildings, and conveniences in the market were rated in respect of their occupation in the ordinary way.

The corporation were rated by the respondents to the poor-rate in respect of these tolls taken under ss. 32 and 36. The corporation contended that the tolls were not liable to be rated: in that they were not paid for or in respect of the use of the soil of the market, but were "market tolls" in the legal acceptance of that term, as distinguished from "stallage."

The question for the Court was, whether the corporation were liable to be rated to the poor-rate for the above tolls.

Poland, for the appellants.

Day, for the respondents.

The same cases were cited as in the principal case.

COCKBURN, C.J. I think it is perfectly clear, that as these tolls are taken in respect of articles carried into the market, and are not paid in respect of stallage or other corporeal property occupied within the market, this case falls within the principle established in *Rex v. Bell* (5 M. & S. 221). I cannot distinguish these tolls from the tolls mentioned in that case; the only difference being, that in the present case they are taken by virtue of an Act of Parliament, instead of being taken by virtue of an ancient franchise. The tolls do not acquire a different character because, instead of being prescriptive tolls, they happen to be tolls taken by Act of Parliament; they are still tolls not taken in respect of the soil, but in respect of the franchise of the market.

BLACKBURN, J. I am of the same opinion. It is established by the construction put upon the Poor Law Amendment Act, that such things only can be rated as enhance the value of the occupation of the land. The practical result established in many of the cases cited, and which no one disputes, is that stallage tolls paid to the lord of a market for the occupation of the land are rateable; whilst the market tolls are considered as attached to his franchise, and are not rateable. That may be a distinction that may seem to an ordinary mind, knowing nothing of the law, to be one not easily understood, why the lord is not rateable in respect of the one, and rateable for the other. The only question is, whether, under this Act of Parliament, the tolls which the corporation have power to take are franchise tolls or stallage tolls payable for the occupation of the soil. I can see nothing to distinguish them from market tolls attached to a

1872

THE QUEEN
v.
CASSWELL.

franchise. If the legislature did mean to make the corporation rateable in a different way from an ordinary lord of a market (which they might well have done), they should have expressed their meaning clearly.

LUSH, J., concurred.

Judgment for the appellants.

Attorney for appellants: *T. J. Nelson.*

Attorney for respondents: *J. Pontifex.*

Jan. 24.

GUEST, APPELLANT; THE OVERSEERS OF EAST DEAN, RESPONDENTS.

Poor-rate—Rateability of Surface Land and Buildings, &c., connected with Iron Mines—Mode of ascertaining Rateable Value.

8QB. 449
10QB 11-32
12 D. 316
The appellant was the owner of iron mines, and he rented two acres and a half of surface land partly over and partly adjoining the mines; he occupied the mines and land together, using the surface for the purpose of working the mines and getting the ore, and he had erected thereon buildings, machinery, workshops, and tramways. The surface land, buildings, &c., without the mines, would be practically valueless:—

Held, that the appellant was rateable to the poor-rate in respect of the surface land with the buildings, machinery, workshops, and tramways, although they were occupied in connection with a non-rateable subject-matter, viz., an iron mine. That the way to ascertain the rateable value was to assume the mines and surface to be in different hands, and then to calculate what rent the occupier of the mine would have to pay for the surface with the buildings, &c., erected thereon.

Rees v. Bilston (5 B. & C. 851) discussed.

CASE stated under 12 & 13 Vict. c. 45, s. 11, on an appeal to the Gloucestershire Quarter Sessions against a poor-rate for the township of East Dean.

The appellant, Sir Ivor Bertie Guest, is the owner and occupier of certain mines of iron ore, called Westbury Brook and Dean's Meend, as galee or assignee of certain gales from the Crown, under 1 & 2 Vict. c. 43.

By s. 1 of 24 & 25 Vict. c. 40, the grant of a gale of coal or iron shall be deemed to have conferred, and shall confer, on the galee and his assigns a licence to work the mine, and shall be deemed to have conferred on the grantee and his assigns an interest in the nature of real estate, such licence being conditional on the payment of royalties to the Crown.

Exfld Litter of Duke of Leinster 42 10QB 17

By s. 25 of 1 & 2 Vict. c. 43, the commissioners may grant to any galee leases for terms not exceeding thirty-one years of the unenclosed waste land of the Forest of Dean, for the purpose of erecting thereon any house, building, or machinery for the convenient working of any mine, or for any purpose connected with any mine or work, not more than one and a half acres of land to be included in any such lease. Certain surface lands included in the assessment appealed against were demised to the appellant, under the above section, for the purposes therein mentioned, for thirty-one years, and he has the exclusive possession and occupation thereof.

1872

 GUEST
 v.
 EAST DEAN.

Some of the surface lands are above the mine of iron ore, and other of such surface lands are distinct and separate from the mines. The mines extend over an area of about 310 acres, and the surface lands over an area of 2a. 16p.

The pit included in the rate is an oval or egg-shaped shaft about 222 yards deep and sixteen and a half feet and eight feet wide: it is partly lined with stone or brick work. In the centre of the shaft are guides or frames to steady the cage on which the carts containing the ore are brought to bank. At one or both ends of the shaft are three sets of pumps about fourteen inches in diameter, for pumping water from the workings near the pit; and on the demised surface lands is a large stone building, which contains an engine of 170 horse-power, used for pumping water by means of the pumps in the shaft. There is also another building containing an engine of fifty horse-power, used for bringing the ore from the mine. There are boilers set in masonry, and a large chimney to the furnaces for heating the boiler. The boilers belong to the engines. All these are absolutely necessary to bring the iron ore to bank.

The other buildings, plant, and tramways comprised in the rate consist of one office, two workshops, and two store houses; a weigh-bridge fixed in the land, capable of weighing up to seven tons; and 745 yards of railway, laid on the land in the usual manner, which railway is used for bringing coals to the boiler furnaces, and for conveying the iron ore away from the pit mouth; all which offices, workshops, storehouses, and weigh-bridge are constructed in the demised surface lands.

1872

GUEST
v.
EAST DEAN.

The surface lands and buildings, and the railway, tramway, plant, and machinery, are occupied and used by the appellant, solely for the purpose of the mines called Westbury Brook and Dean's Meend, and are necessary for such purposes; and without the mines the surface lands, buildings, railway, tramway, plant, and machinery would be practically valueless.

By a rate of the 12th of May, 1870, and by another rate of the 8th of October, 1870, the appellant was rated in respect of the above mines and surface land, the description being "Land containing iron ore, within the boundary of the Westbury Brook Gale of iron ore; surface land, with the pit, buildings, machinery, plant, tramways, and other workshops connected therewith."

The question for the Court was whether the appellant is liable to be rated to the poor-rate for the properties mentioned in the assessment, or either of them; and if for the surface land, on what principle it is to be assessed; the case to be remitted to the sessions for the purpose of ascertaining the rateable value.

Manisty, Q.C. (*Macnamara* with him), for the appellant. Since the decision of the House of Lords in *Morgan v. Crawshay* (1), it will not be disputed that the appellant is not rateable in respect of the occupation of the iron mine; and the pit must of course follow as part and parcel of the mine. The rateability of the surface land and the buildings, tramways, &c., upon it is now the only question. It is found in the case that they are practically valueless without the mines; and *Rex v. Bilston* (2) is a direct authority that they are therefore not rateable; for whether, in the present case, the principle on which the judgment of Bayley, J., or that of Holroyd, J., proceeded be applied, it equally follows that the whole of this surface is non-rateable, being either part and parcel of the mine, according to Bayley, J., or "not profitable except as respects the mine itself," according to Holroyd, J.

H. James, Q.C. (*Anstie* with him), for the respondents. The iron mine not being rateable, it may be difficult to deny that the shaft is also not rateable as part of the mine itself.

[BLACKBURN, J. There can be no doubt of that.]

But the surface land, with the buildings, tramways, and ma-

(1) Law Rep. 5 H. L. 304.

(2) 5 B. & C. 851.

chinery, is rateable at the enhanced value which they have as being of utility for the working of the mine: *Talargoch Mining Co. v. St. Asaph* (1); *Reg. v. Metropolitan Board of Works*. (2) Those cases in effect overrule *Rea v. Bilston*. (3) The appellant is in occupation of both mine and surface; but in order to ascertain the rateable value of the surface, it must be assumed that he is only occupier of the mine, and the question would be, what is a fair rent for the owner of the surface to get for letting the appellant the use of it with the buildings, &c., upon it. And this is always the way the rateable value of anything not actually let from year to year must be calculated. The question is, what would the hypothetical tenant have to give for the subject-matter as it is. It is true that the land is of no value except in connection with the mine, but so it was found or assumed as to the water-course in *Talargoch Mining Co. v. St. Asaph*. (1)

Manisty, Q.C., in reply. In the cases cited for the respondents, the principle seems to be this, though that which was held rateable was auxiliary to a non-rateable subject, yet it had a rateable value independent of the actual purpose to which it was put, and consequently was rateable, notwithstanding the purpose to which it was put was connected with a non-rateable subject. But here the land and buildings are expressly found to be of no value except in connection with the mine.

COCKBURN, C.J. Upon the only question on which our decision is now asked our judgment ought to be in favour of the respondents. It must now be taken to be settled law, there having been a decision of the House of Lords upon the question, that the mines of the appellant, being iron mines, were not liable to be assessed to the poor-rate. The case shews that there may be, as we know that otherwise in point of law there may be, a complete separation between the surface soil above and the mineral below, and I think we must consider this case with a view to what would be the state of things and the law as applicable to the rateability of the property, if there had been such an entire separation. The appellant, indeed, is the mineowner in one right

1872

 GUEST
 v.
 EAST DEAN.

(1) Law Rep. 3 Q. B. 478.

(2) Law Rep. 4 Q. B. 15.

(3) 5 B. & C. 851.

1872

GUEST

v.

EAST DEAN.

and the owner of the surface in another as renting it from the Crown. The ownership of the mine, then, being one thing and the ownership of the surface another, although the mine is not, in point of law, rateable as the law now stands, why should we not maintain and act upon the same substantial distinction between the ownership of the mine and the ownership of the surface? Suppose, by testamentary or other disposition of an owner, in whom the entire soil surface as well as minerals had been united, the mine and mineral had been given to one person and the surface to another. The owner of the mineral, if he desired to work it, and if with a view of working it he desired to erect buildings, would have had to make his bargain with the owner of the surface in order to obtain from him the right to use it for the purpose of mining operations. In this case the appellant, having united in himself, though in different titles and interests, the ownership of the surface and the ownership of the mine, has brought the surface into a condition in which it is no longer available for agricultural purposes; but it is available for the purpose of the tramway and various buildings which are necessary for the working of the mine. Suppose that they are not in the hands of the same individual, and the appellant were under the necessity of saying to the owner of the surface: "Upon what terms will you let me the surface in order that I may use it in its now present condition for the purpose of the mine?" It is clear that the surface, by reason of its usefulness for the purpose of having the necessary buildings upon it, and for having the tramway and other things necessary for the working the mine, would have a given value to be rented and used by the owner of the mine below, and no one in whom the ownership of the surface was vested would allow the owner of the mine to have the use of the surface except for a substantial consideration. It is true that the owner of the mine to a certain extent would be at the mercy of the owner of the surface, and the latter would know perfectly well, that, unless he let him have the use of the surface upon terms agreed upon between them, the mine could not be worked. On the other hand the owner of the surface would know that if he was too extortionate in his terms he would but defeat his own object, and though he might injure another he

would fail to benefit himself, and, therefore, their common sense and common knowledge would bring the parties together upon terms which would be reasonable. Of course, in settling what those terms would be, each party would take into account the question of how far similar and equally useful accommodation could be got in that immediate neighbourhood; in fact, all the circumstances of the case would be taken into account between the parties, in order to settle what would be the value of the surface for the purpose of carrying on the mines. It seems to me, therefore, in point of principle there is no reason why the value of the surface should not be ascertainable according to the value thus settled between the parties, if such a settlement could practically take place, or, at all events, calculated and estimated according to the surrounding circumstances.

Certainly, in point of principle and policy, it never was intended that the surface of the soil should be withdrawn from rateability and contribution to the local burthens. However, in the case of *Rex v. Bilston* (1), it is said that a different rule was adopted, where the surface lands, which otherwise would have been assessable to the rate, became, as it were, subservient to the purposes of the mine below. I must say that that case is not to my mind a satisfactory one, inasmuch as it seems to me to conflict with the principle of general policy on which all land should be held to be assessable; and when I look at it I do not find that the opinions of the learned judges as reported are at all convincing to one's mind. Mr. Justice Bayley puts it upon the ground that buildings upon the surface were really part of the mine itself. Mr. Justice Holroyd, on the other hand, puts it rather that those buildings were an incumbrance to the land, and therefore destitute of any rateable value. (2) The reason for which Mr. Justice Little-

(1) 5 B. & C. 851.

(2) In the report of *Rex v. Bilston*, in 8 D. & Ry. at p. 737, the judgment of Bayley, J., is given very much as in 5 B. & C.; but Holroyd, J., is reported to have said, "The engine was a matter of burthen, not of profit, except as regarded its connection with the mine. To the mine it was not only useful, but necessary; it was not merely

an adjunct to it, but actually part and parcel of it. As regarded the land, independently of the mine, the engine was altogether burthensome. Then, as the profits of the mine are exempt from poor-rates under the statute of 43 Eliz. c. 2, it follows that the engine, as part of the mine, must be exempt also." Little-
 dale, J., adds, "I am entirely of the same opinion."

1872

GUEST
 v.
 EAST DEAN.

Part 340

1872
 GUEST
 v.
 EAST DEAN.

dale concurred, whether it was the one or the other, is not stated. I must say that I think that where we see that the surface, with that which has been erected or constructed upon it, is essential to the working of the mine, and that as such it would have a value as surface land distinguishable and distinguished from the mine itself, we, upon principle, ought to hold that the surface land, and the buildings erected upon it are liable to the poor-rate, and ought therefore to be assessed. I think, therefore, that with reference to this part of the case, the only one now submitted to our consideration, our judgment should be for the respondents.

BLACKBURN, J. I am of the same opinion. Iron mines and other mines of that sort are, upon the construction of the Statute of Elizabeth, not in themselves rateable, and, therefore, it follows that anything which is a portion of the iron mine is not rateable either. In the case of *Rex v. Bilston* (1), where the question was as to the rateability of a steam-engine, Mr. Justice Bayley seems to me certainly to have thought that the steam-engine was to be taken as part of the mine, and if he was right in fact upon that, I quite agree with him in the law, that it would follow it was not rateable, because it was part of a non-rateable subject. Mr. Justice Holroyd does not seem to have thought it was part of the mine (2), but he seems to have gone upon the ground that it was a valueless thing, except in so far as the iron mines were concerned, in which case I think that his opinion has been repeatedly overruled: because the thing that produces in itself the value is considered rateable, notwithstanding its value is produced by the facility which it affords in connection with the other, a non-rateable subject.

See 10 QB 12
 Now in the present case the greatest difficulty—and it is a difficulty which frequently arises—is to determine what portions of this joint occupation are not part of the mine, and are to be considered ~~as being of a rateable value~~ ^{with the value of the mine}. The Parochial Assessment Act gives a test, which is a very easy test where the matters are, in fact, let separately, and where there is no difficulty in ascertaining what a tenant from year to year did actually pay. But there arises

(1) 5 B. & C. 851.

(2) See note (2), ante p. 339.

the difficulty where the thing is not let, where we cannot test the thing by experience; and we are to say here, what would the hypothetical tenant give for the surface if it was let separately. Then it becomes a question of difficulty, although the principle is plain enough. You are to see all those benefits that the hypothetical tenant would have by having the property which is to be rated let to him, and you are to set against it all that he would have to pay and discharge in order to get that benefit, and allow him a fair tenant's profit, and then the balance would be the rateable value. That is a difficult thing to do, but it is repeatedly obliged to be done; and has been done in rating railways and other things of that sort, where there is no real tenant at all. Then there is here another difficulty which Sir William Erle used to call "the complex problem," where there is a thing, which, as an entirety, is of very considerable value, but if split in two would be either of no value or of comparatively little value. The way in which that generally arises is where the entire subject happens to be in more than one parish, as, for instance, waterworks, where in one parish there is a spring, which, taken by itself, is a nuisance making the whole place a morass; in another parish there is the main pipe, which is by itself wholly valueless; and in a third parish there are supply pipes, which, without the water, would be valueless; but when the three are taken together you get a very large rent. There has always been an immense difficulty in seeing how to apportion the value. You can ascertain the value of the entire thing on principle, though not perhaps very easily, but still you can ascertain it; but when you come to divide the amount between the three parishes, it becomes a very difficult thing; and I have always felt that people are never able to say how it shall be calculated. However, there are rules of thumb by which parties manage to calculate, but what I have said illustrates what the difficulty is.

In the present case, there is the iron mine, which is not rateable at all. There is the surface ground, which the appellant has acquired as lessee, and on it are buildings, engines, and railways and other things, which, taken as they are, are very valuable to the occupier of the mine, and, according to the case, of no value

1872

GUEST

v.

EAST DEAN.

1872
GUEST
v.
EAST DEAN.

to any one but the occupier of the mine, who could not do without them, or something equivalent to them. We are to consider this as one entire subject, and then to decide, if we can, how much of the value produced is due to a rateable subject, and how much is to be the value of the occupation of the mine. It is a difficult question to solve, or to arrive at by principle. I believe that what my Lord has said is the way to test it. Suppose these two subject-matters came into the hands of different owners. The appellant has got the mine, and is in the position of the owner in fee simple. At present he has also the surface as lessee, and he is the occupier of both. But let us suppose that he dies intestate, and that his eldest son becomes the owner of the land, and the younger children and his widow had their shares in the surface, and they had all agreed to let the mine and surface, and the Court of Chancery (the children as minors being made wards in Chancery) had ratified that the mine and the surface should be let to the proposed lessee—a good tenant, who is perfectly willing to give 1800*l.* a year, or whatever it may be, for the mine and the surface, if they let them to him together, but will not give a farthing for the surface without the mine, or for the mine without the surface: and how they apportion the rent is indifferent to him. The Court of Chancery, in managing the estate, would refer it to a chief clerk to say how much of this rent shall go to the next of kin who have the leasehold interest, and how much to the heir-at-law who has got the mines, and the clerk would have to determine how much he would apportion to each. It would be an extremely difficult task, but it must be done, and he would have to do it, and I take it that that is just what the sessions have to do in the present case. Suppose that the two things together had been let to one tenant, at a gross rent which can easily be ascertained, then the sessions are called upon to apportion what would be the fair proportion of that rent to be given for the surface and the buildings on the surface, and how much should go to the owner of the iron mine. When they come to try to do it, I dare say the apportionment will not be very precisely accurate, but if they make a rough guess, and do it as nearly as they can, they will probably do substantial justice.

LUSH, J. I am of the same opinion. In order to work out the Parochial Assessment Act, we must suppose that the surface land is in the market to be let, because the surface land is undoubtedly a rateable subject. Then, if it were in the market to be let, it may be that the appellant would have no competitor, nobody else would deem it worth his while to make any offer for it at all; but we know that it would be worth the while of the appellant to make an offer, because it is so essential to the working of his mines, therefore we know that the land would fetch a value, and would have an occupation value, and so be rateable.

Then as to the amount, I quite agree that we have to send it back to the sessions, and they are to put themselves in the position of an arbitrator who had to determine as between these two parties, looking at all the circumstances, what it would be fair and reasonable for the owner of the mine to pay, and for the owner of the surface to receive by way of rent.

Judgment accordingly. (1)

Attorney for appellant: *Thos. Clark.*

Attorneys for respondents: *Rogerson & Ford.*

(1) The following was the formal rule drawn up:—That the appellant is liable to be rated in respect of the surface land with the buildings, machinery, plant, tramways, and other workshops connected therewith, and that he is not liable to be rated in respect of the residue of the property; that the principle on which the surface land with the build-

ings, machinery, plant, tramways, and other workshops upon it, is to be rated, is to assume the mine and the surface to belong to separate owners, and then say what rent the owner of the mine would give to the owner of the surface for the surface land, with the buildings, machinery, plant, tramways, and other workshops upon it.

1872

GUEST
v.
EAST DEAN.

1872

Feb. 13.

[IN THE EXCHEQUER CHAMBER.]

TOLEMAN v. PORTBURY AND OTHERS.

Ejectment—Landlord and Tenant—Forfeiture for Breach of Covenant—Waiver of Forfeiture—Covenant not to permit Auction on Premises.

6PC375
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22CD43

In an indenture of lease, of the 23rd of March, 1860, from plaintiff to C., was a covenant by C. not to permit a sale by auction on the premises without plaintiff's consent, with a proviso for re-entry on non-payment of rent or breach of any of the covenants. On the 11th of April, 1867, C. assigned the goods on the premises by a deed of mortgage, with power to the mortgagees, in default of re-payment of the loan, to sell the goods by auction on the premises. On the 22nd of April C. mortgaged the premises by under-lease to defendant, with a proviso that C. should retain possession of the premises so long as he paid the loan by certain instalments, and was not bankrupt, and did not enter into any deed for the benefit of creditors; but that on default in payment, or any breach of the foregoing proviso, defendant might enter and take possession, &c. On the 30th of April C. executed a deed conveying all his estates and effects to trustees for the benefit of creditors. C. remained in possession of the premises; and in his absence, on the 23rd of May, the mortgagees, acting under the deed of assignment of the 11th of April, sold the goods by public auction on the premises, without plaintiff's consent. Plaintiff thereupon brought ejectment; and, on the above facts, the jury found that the sale by auction took place by permission of C. :—

Held, that C. had power to give permission for the sale, notwithstanding his conveyance of the premises after the deed granting the power of sale; and that a forfeiture had therefore been incurred.

In ejectment by landlord under a proviso for re-entry on breach of covenants, plaintiff, under an order for particulars, gave as breaches the permitting a sale by auction on the premises without plaintiff's consent, and the non-payment of rent accrued due since the sale. Defendant obtained a judge's order staying the action as to the breach for non-payment of rent, on payment of the rent to plaintiff, or into court, if he refused it. Plaintiff refused the rent, and it was paid into court. At the trial the forfeiture by the sale by auction was proved :—

Held, affirming the judgment of the Court of Queen's Bench, that there had been no waiver of the forfeiture.

APPEAL from the decision of the Court of Queen's Bench, in refusing and discharging a rule to enter a verdict for the defendant.

Ejectment commenced by writ of the 11th of April, 1870, for a house and appurtenances; the defendants did not appear, and one Reed was admitted to defend as landlord.

The plaintiff sought to recover possession on a forfeiture; and

the following particulars of breaches were delivered under a judge's order:—The non-payment of 366*l.* 15*s.* for three years rent of the premises, from the 25th of March, 1867, to the 25th of March, 1870; the permitting a sale by public auction to take place on the premises on the 25th of May, 1867, without the consent in writing of the plaintiff, contrary to the covenant contained in the lease from the plaintiff to Robert William Candler.

The defendant obtained an order, under s. 212 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), that on payment of the amount of rent found to be due by the master, with costs, to the plaintiff or attorney in the action, or, if refused by them, on payment of the amount into court, all proceedings be stayed so far as the breach for non-payment of rent. The amount of rent, &c., was tendered to the plaintiff and refused, and was then paid into court.

At the trial, before Hannen, J., at the sittings in Middlesex, in Trinity Term, 1870, the following facts were proved:—

By indenture of lease between the plaintiff and Candler, of the 23rd of March, 1860, the plaintiff demised the premises in question to Candler for twenty-one years from the 25th of March, 1860, at the yearly rent of 122*l.* 5*s.*, payable quarterly. Candler, for himself, his heirs, executors, administrators, and assigns, covenanted that he and his assigns would not permit any sale by public auction to take place on the said premises without the consent in writing of the plaintiff; and there was a proviso for forfeiture and re-entry on non-payment of rent, or in case of the breach or non-observance of any of the covenants on the lessee's part.

On the 11th of April, 1867, by indenture of mortgage between Candler and Edgely and Aylett, in consideration of the loan of 50*l.*, Candler, the mortgagor, assigned unto the mortgagees all the goods, chattels, and effects of the mortgagor then being in or upon the premises then occupied by the mortgagor; and it was thereby declared and agreed, that in case default should be made in payment by the mortgagor, then it should be lawful for the mortgagees immediately, and whenever they should think fit, to sell and dispose of the said goods and chattels, or any part thereof, on or at the said house or premises, where the said goods, chattels,

1872

TOLEMAN
v.
PORTBURY.

1872

TOLEMAN
v.
PORTBURY.

and effects then were, or to remove the said goods, chattels, and effects, and to sell the same, whenever and wheresoever they should think proper, by private contract or public auction.

By indenture of the 22nd of April, 1867, between Candler and the defendant Reed, Candler demised by under-lease the premises to Reed for fourteen years, from the 25th of March, 1867, less three days, by way of mortgage to secure the sum of 300*l.*, the whole of which is still unpaid; provided that if the mortgagor should, on or before the 22nd of July next following the date thereof, pay unto the mortgagee the said sum of 300*l.*, together with interest, then the mortgagee would, at the request and costs of the mortgagor, surrender and re-convey the premises to him or as he should appoint; and provided that if the instalments of 25*l.* each of the said sum of 300*l.*, with interest, should be duly and punctually paid by the mortgagor on the said 22nd of July then next, and further instalments of 25*l.* every succeeding quarter; and provided that the mortgagor should not become bankrupt, or enter into any deed of trust, composition, arrangement, or otherwise, for the benefit of his creditors, and should keep, observe, and perform all the covenants, provisoes, and conditions therein and in two several thereinbefore-recited indentures of lease respectively contained (one of which was the indenture of the 23rd of March, 1860), on his part to be kept, observed, and performed; then and in such event the said sum of 300*l.*, or the residue thereof which might for the time being be due, with all interest as aforesaid, should not be called in together, but should be taken and accepted by the mortgagee by the instalments at the times and in manner thereinbefore expressed; and provided that, until default in payment as aforesaid, and no breach of the covenants, clauses, and conditions therein contained should have been made by the mortgagor, the mortgagor should have full and free enjoyment of the said premises, without any molestation, interruption, or eviction by the mortgagee or any person claiming under him; and provided also that on and after default should be made in such payment, or any breach as in next preceding proviso mentioned, it should and might be lawful for the mortgagee to enter upon the premises, and to take and receive the rents and profits thereof, and apply the same in payment of any principal, interest, or other moneys, costs,

charges, or expenses which might be due and owing to the mortgagee under or by virtue of those presents.

1872

TOLEMAN
v.
PORTBURY.

On the 30th of April, 1867, Candler executed an assignment of all his estate and effects to three trustees absolutely, to be applied and administered for the benefit of the creditors of Candler in like manner as if he had been adjudicated a bankrupt, and the deed was registered under s. 194 of the Bankruptcy Act, 1861.

The defendant Portbury was the occupier of a portion of the demised premises at the times of service of the writs of ejectment hereinafter mentioned.

On the 23rd of May, 1867, Edgely, as acting under the bill of sale, sold by public auction upon the said premises certain goods, chattels and effects in the bill of sale mentioned. Previously to the sale bills announcing the same were posted on the premises.

The plaintiff did not give consent to the sale by auction on the premises, or know of the sale until some time afterwards.

It was also proved at the trial that Candler, who had previously remained in possession of the premises, had left the premises before the auction, and was at that time in Bath.

The defendant Reed did not assent to the sale, and was not in possession of the premises.

In the year 1867 the plaintiff brought two actions of ejectment against the now defendants for the recovery of the possession of the premises on a forfeiture of the lease by reason of the said sale by auction. In both actions the plaintiff was nonsuited. (1)

The jury found that the sale by auction took place on the premises with the permission of Candler; and the learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him on the following points:—1st, that the lessee, Candler, had no power to give a lawful permission for the sale by auction on the premises; 2nd, that the forfeiture, by permitting such sale, was waived by bringing this action for a forfeiture for non-payment of rent accrued due after knowledge by the plaintiff of such sale, and by the plaintiff treating the tenancy as existing after such knowledge.

The Court of Queen's Bench refused a rule on the first point,

(1) As to the second action, see Law Rep. 5 Q. B. 288.

1872

TOLEMAN
v.
PORTBURY.

and granted a rule, which was afterwards discharged, on the second point. (1)

The questions for the Court of Appeal were, whether the facts disclosed a ground of forfeiture by reason of the sale by auction; and if so, whether such forfeiture was not waived.

Baylis, for the defendant. The licence for the sale in the bill of sale did not authorize a sale by auction on the premises; the last clause, "by private contract or public auction," only applies to the alternative of a removal and sale elsewhere.

[BRAMWELL, B. My Brother Grove points out that that is not open to you on the reservation, which is that Candler had no power to give a lawful permission for the sale by auction on the premises.]

Assuming that the licence gave the power, it was revoked by the subsequent mortgage by way of underlease.

[BRETT, J. Candler does not revoke the licence which he had given by deed; how could the subsequent acts of Candler behind Edgely's back affect the power of sale previously given?]

The bill of sale gave no interest in the premises; it was a mere personal licence, which was revoked as soon as Candler ceased to have any present interest in the premises. But even if it be said that Candler retained possession under the mortgage, yet on his executing an assignment for the benefit of creditors, all his interest whatever passed out of him, and, moreover, Reed could then enter, and, therefore, Candler could not "permit" a sale by auction: *Hobson v. Middleton* (2); where Bayley, J., points out that "permitting or suffering" means that the defendant should not concur in any act over which he had a control.

[BRETT, J. Candler remained in possession up to the time of the sale, and there was the continuing power to sell under his deed of the 11th of April].

Secondly, there was a waiver of the previous forfeiture by relying on a forfeiture for the non-payment of subsequent rent, which assumes the lease to be still continuing after the first forfeiture.

(1) As to the second point, see Law Rep. 6 Q. B. 245.

(2) 6 B. & C. 295, 303.

[BRAMWELL, B. The judges in the court below do not notice that there had been a former action for this very forfeiture, by bringing which the plaintiff conclusively elected to treat the lease as forfeited.]

There was a revocation of the election.

[BRAMWELL, B. Can that be ?

CLEASBY, B. In the judgment in *Jones v. Carter* (1) Parke, B., says that the bringing of an ejectment for a forfeiture must be considered as the exercise of the lessor's option to determine the lease, "and the option must be exercised once for all."]

The rent has been paid : it would be a great hardship if the plaintiff can, not only maintain the forfeiture, but also receive the rent as if the lease had not been avoided.

J. Brown, Q.C. (*J. Rose* with him), for the plaintiff, was not heard.

KELLY, C.B. We are of opinion that the judgment should be affirmed. This was an ejectment on a forfeiture for breach of covenant, a verdict passed at the trial for the plaintiff, leave being reserved to move to enter a verdict for the defendant on two points : first, that the lessee, Candler, had on the facts committed no breach of covenant by reason of having given a licence for a sale by auction on the demised premises, and as to this the Court of Queen's Bench refused a rule ; and, secondly, as to which the Court granted and afterwards discharged the rule, that the forfeiture had been waived by reason of the plaintiff having given in the particulars of breaches, in addition to the breach of covenant by permitting the sale by auction, the non-payment of rent due subsequently to the sale.

As to the first question, the terms of the covenant are that the lessee and his assigns would not permit any sale by public auction to take place on the premises without the consent in writing of the lessor. No consent was given, but a sale by auction took place on the premises ; and the question we have first to decide is whether on the facts the covenant has been broken. By a bill of sale of the 11th of April, 1867, Candler the lessee, mortgaged certain goods and chattels on the premises to Edgely and another as security for

1872

TOLEMAN
v.
PORTBURY.

(1) 15 M. & W. at p. 726.

1872

TOLEMAN
v.
PORTBURY.

a loan of 50%, and by the deed it was declared and agreed, that in case default should be made in payment, it should be lawful for the mortgagees immediately and wherever they should think fit, to sell and dispose of the goods and chattels on or at the said premises where the said goods and chattels then were, or to remove them, and to sell the same whenever and wheresoever they should think proper, by private contract or public auction. It was objected on behalf of the defendant that "by private contract or public auction" only applied to the sentence immediately preceding it, and not to the first branch of the licence; but it is impossible to read the whole licence without seeing that the last clause "by private contract or public auction," applies equally to either alternative, viz., to the sale on the premises as well as to the removal and sale elsewhere. This, therefore, was clearly a permission under seal on the part of Candler of a sale by auction on the premises, and followed as it was by an actual sale, there was *primâ facie* a breach of the covenant. But then it is objected that the power of the lessee to grant any licence was at an end before the sale took place, and that the licence therefore became inoperative by means either of the underlease or the assignment to creditors. There is nothing in the lease of the 22nd of April itself which can amount to a revocation of the licence; but it was said that by the grant of the under-lease this power of the licensee to act under the licence was determined, and put an end to. I think it was not. The underlease was in fact a mortgage, and as long as the mortgagor continued to pay the instalments it was provided that he should continue in undisturbed possession, and Candler did in fact retain possession of the premises until after the sale by auction. Therefore the only question in this part of the case is whether the licence was *ipso facto* determined by the new grant? But as between the parties to it the licence continued, and there was nothing, so far as Candler was concerned, to prevent Edgely entering and exercising the power given by the licence, and doing what he in fact did in May. It may be doubtful whether the mortgagee could have interfered so long as the instalments under the mortgage were paid, and there had not been any default in payment. But, though he might not have been able to interfere on this ground, it is said, the mortgagee might have done

so under the proviso and by reason of the subsequent assignment for the benefit of the creditors. Assuming the mortgagee had power to interfere at once and determine the lessee's possession, he did not do so. Candler remained in possession, and, so far as this under-lease was concerned, Edgely entered lawfully by the permission of Candler, and effected the sale on the premises.

But then the further question arises, whether the assignment for the benefit of creditors, which it is said put an end to the title of Candler altogether, did also put an end to the licence he had previously granted; and it is urged that, according to the case of *Hobson v. Middleton* (1), he could not be said to permit that which he had no longer any power to prevent. I am clearly of opinion that the assignment had no such effect; it might, assuming the mortgagee not to have interfered, have enabled the trustees to enter and dispossess Candler, but nothing of the kind took place, and the possession of Candler was lawful as long as it was not interfered with. I think, therefore, that neither the under-lease by way of mortgage, nor the assignment for the benefit of creditors, even if they had any effect in law, had any effect on the licence, under seal, or in preventing the lawful entry of Edgely, and the sale under that licence from being a sale by the permission of Candler, and consequently a breach of his covenant with the plaintiff. On these grounds, I think the defendant's objections fail, and that a forfeiture was clearly proved.

The other point is, whether the plaintiff, by including in the particulars of breaches the non-payment of rent accrued after the sale by auction, has become disentitled from taking advantage of what we have decided to be a ground of forfeiture. It may well be contended (though it is not necessary to the decision of the case) that the bringing an ejectment and carrying it down to trial, and relying on the sale by auction as a ground of forfeiture, was a conclusive election on the part of the plaintiff to put an end to the lease, and that it was not competent to the plaintiff afterwards to treat the lease as subsisting, and therefore that a claim for rent which the plaintiff could not support could not have the effect of waiving the forfeiture. But all that in fact took place was that the defendant took out a summons under the statute to stay the

1872

 TOLEMAN
v.
PORTBURY.

(1) 6 B. & C. 295.

1872
TOLEMAN
v.
PORTBURY.

ejectment as to the forfeiture for non-payment of rent on payment of the arrears into court, and the plaintiff refused to accept the money which still remains in court; this, therefore, cannot affect the forfeiture already incurred. But it is said it is an injustice that the plaintiff should be able to maintain the forfeiture and still have the rent; but I cannot see this: the plaintiff is clearly entitled to the money, either as rent if there were no forfeiture, or as mesne profits if there was. But it is clear on the grounds so forcibly and clearly stated in the Court of Queen's Bench, that the mere claim of forfeiture by reason of the non-payment of the rent, does not in itself preclude the plaintiff from relying on the previous forfeiture by reason of the sale by auction. When the rent was paid into court all proceedings in the ejectment for the forfeiture for non-payment of rent were at an end; but I cannot see on what ground it can reasonably be maintained that a landlord by claiming a forfeiture for non-payment of rent loses the benefit of a previous forfeiture. I am, therefore, of opinion, that the defendant has failed on both points, and the judgment of the Court of Queen's Bench must be affirmed.

BYLES, KEATING, BRETT, and GROVE, JJ., and BRAMWELL, CHANNELL, PIGOTT, and CLEASBY, BB., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Reed & Lovell.*

Attorney for defendant: *Ellerton.*

WHITE, APPELLANT; FEAST, RESPONDENT.

1872

Jan. 17.

Jurisdiction of Justices—24 & 25 Vict. c. 97, s. 52—"Wilful" Damage to Property—"Fair and Reasonable Supposition of Right."

By 24 & 25 Vict. c. 97, s. 52, "whoever shall wilfully or maliciously commit any damage to any real or personal property, shall, on conviction before a justice, be subject to imprisonment or fine. . . . Provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of. . . ."

The appellant was charged under the above section on the following facts: The appellant, being employed by D., went with thirteen other men and, without any communication with the respondent, entered an enclosed garden of the respondent's and dug a ditch four feet wide and three feet deep, and from forty to fifty yards long, extending from one end of the garden to the other. There had, some fifteen years ago, been a ditch over part of the ground, before it was enclosed as a garden by respondent's predecessor in title; but there had never been any ditch for about twenty yards of the length cut by appellant. D. was exercising "what he considered a public right."

The justices found that the appellant did not act under a reasonable supposition that he had a right to do the act complained of, and convicted him accordingly:—

Held, that the conviction was right; that the express proviso in s. 52 overrode the proviso usually implied as to summary convictions, that a bonâ fide claim of right ousted the jurisdiction of the justices. That, under the circumstances, the appellant could not be in a better position than D. who employed him, and assuming in his favour (which did not appear) that he had all the knowledge which D. had, the justices were right in finding that he did not act under a fair and reasonable supposition of right.

CASE stated by Justices of Norfolk, under 20 & 21 Vict. c. 43.

An information was preferred against the appellant by the respondent, for that he did unlawfully, wilfully, and maliciously commit damage, injury, and spoil, to and upon certain real property of the respondent of a private nature, to wit, the land and soil of a certain garden, by then and there digging and cutting a certain gripple therein, thereby then and there doing injury to the amount of 1*l.*, contrary to 24 & 25 Vict. c. 97, s. 52. (1)

(1) 24 & 25 Vict. c. 97, s. 52: "Whoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace,

at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding two months, or else shall forfeit and pay

1872
 WHITE
 v.
 FEAST.

It was contended on behalf of the appellant that the justices had no jurisdiction to hear and determine the information ; but it was not shewn to the justices by evidence or otherwise that the appellant acted under a fair and reasonable supposition that he had a right to do the act complained of. The justices therefore determined to proceed with the hearing of the information.

It was proved that the respondent lives at Walsoken, and is the owner and occupier of a garden there, of which his father was the owner up to the time of his decease.

The appellant lives about six miles from Walsoken, and on the day mentioned he came with thirteen other men and, without any communication with the respondent, forcibly entered the respondent's garden, and dug and cut in the land and soil thereof a gripple (which means a small ditch) about four feet wide at the top and about three feet deep, and from forty to fifty yards in length, extending from one end of the garden to the other.

The father of the respondent and the respondent (who immediately succeeded his father) have occupied the garden in succession uninterruptedly for thirty-six years ; and there never was, during that period, or at any previous time, any gripple or ditch whatever upon the site of at least from fifteen to twenty yards in length of the gripple dug and cut by the appellant at that end of such gripple which lies next the road called the Silt Road.

No gripple has existed for many years, if ever, upon the site of the residue of the gripple dug and cut by the appellant until he so dug and cut the same.

The damage and injury done by the appellant to the land and soil of the garden, and to the respondent as the owner, by digging and cutting the part of the gripple of the length of from fifteen to twenty yards where none formerly existed, amounts to 1*l*.

such sum of money not exceeding 5*l*., as to the justice shall seem meet, and also such further sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 5*l*. . . . Provided that nothing herein contained shall extend to any case where the party acted under

a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as if this Act had not passed."

The following witnesses were examined on behalf of the appellant:—

1872

 WHITE
 v.
 FEAST.

Adam Dawson deposed : I live in Wisbeach, and know Chapel Street, Walsoken. I purchased property there in 1839 ; at that time there was a gripple from Chapel Street to the Silt Road about three feet wide and a foot and a half to two feet deep ; it took the surface drainage of Chapel Street. When it got to the Silt Road I don't know where it went to. At that place it passed near the property of the respondent's father. There was a cart-road between the gripple and the property. The gripple continued there the whole way from Chapel Street to the Silt Road from the time I purchased the property in 1839, for twenty-two years. When the respondent's father enclosed the whole of that portion which was on the south side of his property I cannot say whether he filled in the dike or not. The dike was there when he enclosed it. I gave directions for the dike to be cut.

On cross-examination—

I was exercising what I considered to be a public right. I never asked respondent to cut the gripple out. I think it was a proper thing to do. I swear the gripple ran through to the Silt Road. I can't say when I saw it open last. I swear it was open fifteen years ago. I can't say whether water went down it. The chairman of the board of health said if we would find a drainage the board would take the road. I submitted to the drainage being closed fifteen years ago. I don't remember the gripple being cut.

Joseph Larmer deposed : I live in Wisbeach and know Chapel Street, Walsoken, and South Street and the Silt Road. South Street intervenes between Chapel Street and the Silt Road. I remember a gripple in 1855 extending from Chapel Street to the Silt Road. I should call it a small ditch, four feet wide at the top and two or three feet deep. I've seen water in it the whole way. It passed the property now occupied by respondent, and there was a road between it and such property for foot passengers with a hand-cart. Mr. Feast, the elder, enclosed his part about 1860 or 1861. He enclosed it with high boards at both ends. I expect it was used as a drainage, and inconvenience has arisen from the enclosure to the drainage, and the road was afterwards enclosed up to Chapel Street.

On cross-examination—

I have nothing to do with the cutting of the ditch. I speak to the best of my knowledge. The gripple was open in 1855. I cannot say when I saw water in it. I cannot name a time when I saw water in it. I came to Wisbeach in 1850, and since that time I saw water at the Chapel Street end. I cannot speak to the other end.

It was then again contended that the justices had no jurisdiction to entertain this case or to adjudicate thereon ; but no evidence was adduced in support of such contention, nor was it made to appear in any way that the appellant had any reason to believe, although set to work by the witness Adam Dawson, that Dawson so employed him in order to assert or exercise any right possessed, or supposed to be possessed, by Dawson ; but, so far as appeared, the appellant was a stranger to the respondent, and did the act

1872
WHITE
v.
FEAST.

complained of in the information under the mere direction of Dawson, and without any knowledge that Dawson asserted the claim mentioned in his evidence.

The justices, on consideration of all the circumstances of the case, found and determined that the appellant did not act under a fair and reasonable supposition that he had a right to do the act complained of. They also found and determined that Dawson and Larmer were in error in deposing that the gripple or ditch to which they deposed as formerly extending from Chapel Street to the Silt Road extended throughout the whole of that distance; and that in fact such gripple, if the same ever existed at all in the line deposed to by them, only extended from Chapel Street to a point short of the Silt Road, and distant therefrom at least from fifteen to twenty yards, and that throughout such fifteen to twenty yards no gripple ever existed until the gripple complained of was dug and cut by the appellant, as charged in the information.

Whereupon the justices adjudged that the appellant was guilty, and convicted him of the offence charged in the information, and adjudged that he should forfeit and pay 1s. penalty, and should pay 1l. compensation for the injury, and 15s. 6d. costs, and in default should be imprisoned and kept to hard labour for seven days, unless the sums were sooner paid.

If the Court should be of opinion that the justices had jurisdiction or power to hear and determine the information, and that, having such jurisdiction or power, they had sufficient authority upon the evidence to convict the appellant of the said offence charged against him in the information, then the conviction was to be confirmed. But if the Court should be of a contrary opinion, then the conviction would be quashed.

G. Bruce, for the appellant, contended, first, that "wilfully," used in s. 52, in connection with "maliciously," must mean something more than intentionally; and that there could be no offence committed without a *mens rea*. Secondly, that although the justices had negatived the reasonableness of the ground of supposition under the proviso of s. 52, yet the jurisdiction of the justices was ousted by the *bonâ fide* claim of right at common law, which restriction was not taken away by the proviso. [He referred to

Reg. v. Stimpson (1); *Reg. v. Pearson* (2); *Leatt v. Vine* (3); *Hudson v. MacRae* (4).] Lastly, the appellant was simply a labourer, ordered to do the work by Dawson; and the justices ought therefore to have found that he had a fair ground for supposing that Dawson had a right to give the order.

Thesiger, for the respondent, was not heard.

COCKBURN, C.J. I am of opinion that our judgment must be for the respondent. Without questioning the general proposition that where summary jurisdiction is given to justices to convict for a trespass, there must be the implied restriction that they are to hold their hands where the defendant sets up a *bonâ fide* claim of right, yet it is perfectly competent to the legislature to qualify this restriction within such limits as seem good to them, and we are bound to adjudicate, in the present case, with reference to the terms of the enactment and proviso in s. 52. By that section a person is made liable to be summarily convicted who has committed, either wilfully or maliciously, damage or injury to property; and by the proviso such *primâ facie* wrongdoer is not entitled to call upon the magistrates to hold their hands, unless he gives them sufficient evidence to convince them that he acted under a fair and reasonable supposition that he had a right to do the act, although he may have honestly believed that he was justified in doing the act. That is, the legislature have chosen to put a different restriction upon the jurisdiction of the justices from that which would otherwise have been implied, inasmuch as they have expressly enacted, that in order to oust the justices' jurisdiction there must have been a fair and reasonable ground for the supposition of the right. The legislature, therefore, having expressly stated the limit, it is not for us to impose any other limit; the express restriction supersedes the implied restriction.

The second question is whether on the facts the justices were right in finding that the appellant had no fair and reasonable ground for the supposition that he had the right to dig the ditch; I think there was abundant evidence on which to find that he had

1872

 WHITE
v.
FEAST.

(1) 4 B. & S. 301; 32 L. J. (M.C.)

(3) 30 L. J. (M.C.) 207.

208.

(4) 4 B. & S. 585; 33 L. J. (M.C.)

(2) Law Rep. 5 Q. B. 237.

65.

1872
WHITE
v.
FEAST.

no such fair and reasonable ground. It is said that the appellant was employed by another as a mere labourer, and that he was justified in doing what Dawson told him to do. But I cannot accede to that proposition, nor do I think that that is the ground on which immunity from the jurisdiction of justices can be claimed. In the present case, at all events, the servant cannot be in a better position than the employer; and I will suppose in his favour, that he had made inquiries and ascertained the grounds on which Dawson himself says he considered he was asserting a substantial public right. I will assume the employer and the appellant to have the same knowledge, and if the ground on which Dawson acted was not fair and reasonable, the appellant can be in no better position. The magistrates set out the evidence on which Dawson says he thought he was exercising a public right; and they find that over part of the ground there never existed a ditch at all and over the rest the ditch had been stopped up fifteen years ago without any assertion of right; and that Dawson sends the appellant with twelve or thirteen other men, without any notice to the respondent, into the respondent's private garden, and tells them to dig the ditch. I think the magistrates were fully justified in the conclusion of fact to which they came. For, though I quite agree that magistrates cannot give themselves jurisdiction or retain jurisdiction by finding a particular fact one way, if the evidence is clearly the other way, yet in the present case, so far from there not being evidence to justify their finding, I think their decision was right.

BLACKBURN, J. I am of the same opinion. It is inaccurate to talk of the common law restriction. All summary jurisdiction is the creature of statute; and on the principle that title could not be intended to be decided by an inferior tribunal, there has arisen the well-established rule, that every statute giving summary jurisdiction has the implied restriction as to title, and that the justices must hold their hands if a *bonâ fide* claim of right is set up. On the other hand, in some statutes, as the Highway Acts, the terms used shew that the justices were not to hold their hands, even if a right were set up. Another rule is, that wherever jurisdiction is given summarily to punish an offence, as there can be no crime unless there be *mens rea*, therefore if the alleged offender *bonâ*

fide thinks he has a right to do the act, that would be a defence. But this necessity of a mens rea depends on the precise terms of the enactment creating the crime or offence, or whether it appears to have been the intention to protect property from mere wilful trespass as distinguished from a guilty act. In the present case the words are "wilfully or maliciously." It is noteworthy that in the previous section (51) the words are "unlawfully and maliciously," and the offence is made a misdemeanour, and there is no proviso. In s. 52 the words are, "wilfully or maliciously," and then comes the proviso excepting the case where the party acted under a fair and reasonable supposition of right. It is to be observed, therefore, that, not only are the words changed from "and" to "or," but there is also the proviso that a trespass committed out hunting or fishing, if not wilful and malicious, shall not be within the enactment, shewing that the legislature very sensibly and purposely distinguished between a trespass wilful or malicious and a trespass wilful and malicious. And it is obvious that very many injuries may be done to property wilfully without being malicious, by persons so poor that a civil action would be no remedy; so that it might well be desirable to protect property, and yet not desirable that the person, though poor, should be ousted of his civil rights if the act were done under a fair and reasonable supposition of right; and the legislature may also well have considered, we may trust magistrates to decide whether the fair and reasonable supposition is or is not well founded; and if a man, with a bonâ fide claim of right, still wilfully does the injury, without a fair and reasonable ground for his supposition, then justices may convict. The real substance of the enactment is the power given to the justices to award compensation to a small amount, and that power ought to be given and exercised whether the act causing the injury be done under a bonâ fide claim of right or not, if not founded on a fair and reasonable ground. The words are, "that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of;" and whether the person charged did so act or not, it must be for the justices to decide on a due consideration of the evidence brought before them. As the proviso expressly says that the claim of right must be founded

1872

 WHITE
v.
FEAST.

1872
WHITE
v.
FEAST.

on reasonable grounds, the ordinary proviso, usually implied as to mere bona fides, is superseded.

The second question is, whether the magistrates were right in saying that the appellant did not act under a fair and reasonable supposition of right. The appellant was hired to dig the ditch as a labourer by Dawson, and it is said that Dawson's orders were sufficient justification. I am far from saying that there may not be many cases where orders of a superior might well afford fair and reasonable ground: as where a farmer in occupation of a farm orders one of his labourers to grub up an adjoining fence, the labourer might very fairly and reasonably suppose the farmer had a right to do this, though in fact he had none. But when a man says "Go and dig a ditch in my neighbour's garden," the labourer cannot fairly say he believed he had the right without inquiry. In this case, therefore, the appellant cannot be in a better position than his employer. If Dawson had a fair supposition of right, then the appellant might be justified under his orders, assuming him to have the same knowledge. Now the facts upon which Dawson acted are these:—[The learned judge went through the facts stated in the case.] Upon these facts it was an unreasonable supposition on the part of Dawson that he had a right to make what amounted to a sewer, through the respondent's property; it is not impossible that he thought he had the right, but on the evidence there was no fair or reasonable ground shewn for his supposition; and, consequently, the justices were right in proceeding to convict the appellant.

MELLOR, J. I am of the same opinion. Where a statute creates an offence, and the statute itself states in precise terms what shall restrain the justices from acting, we are not at liberty to imply any other restriction. In some sense there may have been a *bonâ fide* claim of right, but there were no reasonable grounds on which such a claim could be founded; and the statute makes the reasonableness of the supposition the condition to the magistrates' jurisdiction being ousted.

QUAIN, J. I am of the same opinion. The appellant must bring himself within the proviso, by shewing that he acted under a fair and reasonable supposition that he had a right to do the act. He cannot be in a better position than Dawson, and on reading

the evidence it is impossible to say that the latter had reasonable ground for supposing he had any right to cut a ditch through the respondent's private property, though a very strong motive is shewn why he was desirous of getting the drainage made.

1872

 WHITE
v.
FEAST.

Judgment for the respondent.

Attorneys for appellant: *Jenkins & Abbott, for J. Watson, Wisbeach.*

Attorneys for respondent: *Wing & Du Cane.*

THE QUEEN v. HARRALD.

Jan. 22.

Municipal Election—Right of Married Women to Vote—32 & 33 Vict. c. 55, s. 9—33 & 34 Vict. c. 93.

The 32 and 33 Vict. c. 55, s. 9,—which enacts that, in the Municipal Corporation Acts, words importing the masculine gender shall include females for all purposes connected with the right to vote at the election of councillors, auditors, and assessors,—has reference only to the disability of women by reason of sex, and has no reference to the disability by reason of the status of coverture. And the Married Woman's Property Act (33 & 34 Vict. c. 93) has no reference to the political disabilities of married women:—

Held, therefore (on a rule for a quo warranto against a town councillor who had been elected by a majority of one), that a married woman, though qualified by occupation and payment of rates and put on the burgess list, cannot vote at the election of town councillors.

Semble, that a woman, who is rightly on the burgess list, but married before the election, is also disqualified from voting.

RULE calling on Charles Harrauld to shew cause why a quo warranto information should not issue calling on him to shew by what right he exercises the office of town councillor of the borough of Sunderland.

At the election on the 1st of November, 1871, of town councillors for the borough of Sunderland, the defendant was elected for the Sunderland ward by a majority of one over the next candidate.

Amongst the majority who voted for the defendant were two married women:—Anne Thompson, who, at the time she was put upon the burgess roll, was a married woman, but was living apart from her husband, and was occupying a house and paying rates as a single woman; and Nancy Storey, who was a single woman of the

1872
 THE QUEEN
 v.
 HARRALD.

name of Bull when put upon the burgess roll, but had married on the 22nd of October, just before the election.

Crompton shewed cause. Since 32 & 33 Vict. c. 55, women are capable of voting at municipal elections. By s. 9 of that Act words importing the masculine gender, in that Act and in 5 & 6 Wm. 4, c. 76, are to include females for all purposes connected with the right to vote in the election of councillors, &c. (1) There are no exceptions as to married women, and therefore a woman otherwise qualified is not disqualified by coverture. By 33 & 34 Vict. c. 93 coverture is now no bar to holding property. These women were both on the burgess roll, and *Reg. v. Tugwell* (2) shews that the roll is conclusive as to persons entitled to vote, and the qualification of a person on the roll cannot be questioned on a quo warranto against the person elected.

Herschell, in support of the rule. No doubt the qualification of a person on the burgess roll cannot be questioned in the present proceeding, but coverture is a personal disability, and it matters not when it arises so long as it exists at the time of voting. A married woman is not a person in the eye of the law. She is not *sui juris*.

COCKBURN, C.J. This rule must be made absolute. It appears to me impossible to say that the vote of one of these married women is good, and the vote of the other is also most probably bad. The first was a married woman when put on the burgess roll. It is quite certain that, by the common law, a married woman's status was so entirely merged in that of her husband that she was incapable of exercising almost all public functions. It was thought to be a hardship, that when women bore their share of the public burthens in respect of the occupation of property they should not also share the rights to the municipal franchise and be represented; and it was thought that spinsters and unmarried women ought to be allowed to exercise these rights. The 32 & 33 Vict. c. 55, accordingly, gave effect to these views, and enacted that

(1) 32 & 33 Vict. c. 55, s. 9: "In this Act and the 5 & 6 Wm. 4, c. 76, and the Acts amending the same, wherever words occur which import the masculine gender the same shall be

held to include females, for all purposes connected with and having reference to the right to vote in the election of councillors, auditors, and assessors."

(2) Law Rep. 3 Q. B. 704, 709.

wherever men were entitled to vote, women, being in the same situation, should thereafter be entitled; but this only referred to women possessed of the necessary qualification in respect of property and the payment of rates, and I cannot believe that it was intended to alter the status of married women. It seems quite clear that this statute had not married women in its contemplation. Nor can it be supposed that the subsequent statute, by which the status of married women with regard to the power to hold property has been recognized and established, and which was passed *alio intuitu*, has by a side wind given them political or municipal rights.

The case of the other married woman is somewhat different. She, at the time she was put on the burgess list, was unmarried and was entitled to a vote. Shortly before the election she married, and accordingly she became subject to all the disabilities that attach to married women. It is said that as long as a man retains his qualification his rights are not to be altered by what happens after the name has been put upon the burgess list; but I much question whether that argument applies to a woman who marries, whose status is at once altered, and who becomes at once subject to all the disabilities of coverture. However, it is quite enough to say that there is sufficient doubt, as to the validity of this vote also, to call for further inquiry, and the rule must therefore be made absolute.

MELLOR, J. I am of the same opinion. In *Bright on Husband and Wife*, vol. i., p. 1, it is shewn that marriage is at common law a total disqualification, and a married woman, therefore, could not vote, her existence for such a purpose being merged in that of her husband. Therefore Mrs. Thompson was disqualified at the time she was put upon the burgess roll. The other woman was entitled to vote at the time she was put upon the roll, and was therefore rightly put there, and but for her subsequent marriage would still have been entitled to vote. But s. 9 of 32 & 33 Vict. c. 55, only removes the disqualification by reason of sex, and leaves untouched the disqualification by reason of status. So the Married Woman's Property Act as to this leaves the status of a married woman untouched.

1872

 THE QUEEN
v.
 HARRALD.

1872

THE QUEEN
v.
HARRALD.

HANNEN, J. The Married Woman's Property Act was intended to protect married women in the enjoyment of the rights of property, and was not intended to extend in any way to the political rights of women; and we must not by a side wind give an extension to its effect which we can clearly see was not intended. I own that I am not so clearly satisfied as to the second vote.

Rule absolute.

Attorneys for relator: *Harle & Co.*

Attorney for defendant: *J. W. Hickin, for R. Brown & Son, Sunderland.*

Jan. 23. MAY AND ANOTHER v. THE GREAT WESTERN RAILWAY COMPANY.

Railway—Lands acquired under the Act—Superfluous Lands—Limits of Deviation—Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18) s. 127—Lands already vested not divested by Subsequent Statute.

2QB D. 943
206 D. 426

By s. 127 of the Lands Clauses Consolidation Act, 1845, lands acquired by a company under the Act, but not required for the purposes of the Act, are to be sold within a prescribed period; and superfluous lands remaining unsold at the expiration of the time limited are "thereupon to vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

The defendants, a railway company, after notice to treat, purchased, by agreement, land of the plaintiffs, which was marked upon the plans deposited as being partly within and partly beyond the limits of deviation; on part of the land they constructed their railway, and on part, deposited chalk and spoil, which in making the railway was excavated from a cutting. After the construction of the railway, the defendants, for several years, let the land on which the chalk was deposited to tenants paying rent:—

Held, that the whole of the land was land acquired under the Act, and was superfluous land, which, remaining unsold after the prescribed period, vested in the owners of the adjoining lands.

By a subsequent Act obtained by the defendants, they were empowered to retain and hold any lands, belonging to them, and which had not yet been applied to the purposes of the company, for a period of ten years after the passing of the Act:—

Held, that this enactment did not defeat a right to unsold superfluous land, which had vested, under the Lands Clauses Consolidation Act, at the expiration of the time limited, before the passing of the subsequent Act.

Held in R. v. H. & O. 8 QB 26 by H. & L. R. 7 H. 25
CASE stated by an arbitrator after writ issued.

Ejectment to recover possession of a piece of land containing four acres or thereabouts, in the parish of Basingstoke, in the

county of Hants, and abutting on the north on land now belonging to one John Burgess Soper, and on the south on the road leading to and past the Basingstoke Railway Station.

The defendants defended for the whole of the land.

1. By the Berks and Hants Railway Act, 1845 (8 & 9 Vict. c. cxl.), the Berks and Hants Railway Company were incorporated for the purpose of making and maintaining a railway from or near the town of Reading to the towns of Newbury and Hungerford, in the county of Berks, and another railway diverging from the last-mentioned railway to join the South Western Railway at or near Basingstoke, in the county of Southampton.

2. By s. 34 it was enacted, that the powers of the company for the compulsory purchase of lands for the purposes of that Act should not be exercised after the expiration of three years from the passing of that Act; and by s. 35, that the railway should be completed within five years from the passing of that Act; and on the expiration of such period the powers of that or the recited Acts granted to the company for executing the railway or otherwise in relation thereto should cease to be exercised, except as to so much of the said railway as should then be completed. This Act received the royal assent on the 30th day of June, 1845, the time for the completion of the railway, as prescribed by that Act, therefore expired on the 30th of June, 1850.

3. By 9 Vict. c. xiv., the Berks and Hants Railway was vested in the Great Western Railway Company, with all rights, powers, privileges, and liabilities incident thereto. This Act received the royal assent on the 14th of May, 1846.

4. At the time of the giving of the notices by the defendants hereinafter mentioned, the piece of land sought to be recovered in this action formed, together with certain other land on part of which the defendants' line, station, and other works have since been constructed, a field containing 15a. 0r. 33p., which was then the property of Jane May, John Simonds, and Charles Simonds.

5. The whole of the field, containing 15a. 0r. 33p., was included in the plans and book of reference deposited in the office of the clerk of the peace for the county of Southampton, and referred to by the first-mentioned Act; but the whole of the field was not included within the limits of deviation delineated on the plan, a

1872

MAY

v.

GREAT
WESTERN
RAILWAY CO.

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

narrow strip at the northern end of the field being, on the deposited plan, beyond the line indicating the limits of deviation.

6. By a notice dated the 11th of March, 1846, given pursuant to the provisions of the several Acts of Parliament hereinbefore referred to, the defendants required Jane May, John Simonds, and Charles Simonds to treat with them, the defendants, for the purchase by the defendants of 3*a.* 1*r.* 4*p.*, part of the field, for the purposes of the said railway; and it was agreed that the value of the same should be settled by arbitration, and the arbitrator, by his award, dated the 22nd of August, 1846, fixed the value at the sum of 571*l.* 7*s.*

7. By another notice, dated the 5th of November, 1846, given pursuant to the provisions of the said several Acts of Parliament the defendants required Jane May, John Simonds, and Charles Simonds to treat with them for the remainder of the field for the purposes of the railway, and the value was subsequently agreed between the parties at 1760*l.* In both the notices it was stated that the land was required by the Great Western Railway for the purposes of the Berks and Hants Railway.

8. By an indenture dated the 12th of May, 1847, made between Jane May, John Simonds, and Charles Simonds, of the one part, and the defendants of the other part, the whole of the land, containing 15*a.* 0*r.* 33*p.*, was, in consideration of the sum of 2331*l.* 7*s.* (being the amount of the two sums of 571*l.* 7*s.* and 1760*l.*), conveyed by Jane May, John Simonds, and Charles Simonds to the defendants, their successors and assigns, for ever.

9. Immediately upon the completion of the purchase, the defendants took possession of the field; and upon a portion thereof, containing 5*a.* 0*r.* 33*p.* or thereabouts, constructed in part the line of railway, together with a station and other works connected with the railway, the land used for such purpose being at the southern end of the field; and upon part of the remainder of the field they deposited chalk and other spoil, which in making the railway was excavated from a cutting near the field; and in order to provide, and for the purpose of providing, a place for depositing the chalk and spoil from the cutting, purchased the whole of the field, instead of purchasing only a part.

10. The station constructed by the company on the field is a

terminal station, and is situated at the junction with the London and South Western Railway at Basingstoke.

11. The chalk and spoil so deposited still remain where they were deposited on the part of the field, and in some places they are in mounds, and in depth vary from about one foot at the edges, to eight or nine feet where there are mounds.

12. After the chalk and spoil had been deposited and the railway 'opened, the company allowed their servants and persons employed by the company, to occupy the portion of the field not used for the station, as gardens and for other purposes; and in one or two instances, persons not servants of or employed by the company were in the occupation of parts of the field, and on one or two occasions paid small rents to the station-master; but as to this, it is to be taken that the station-master received such rents for his own use, and not on account of, or as agent for the company, and that, having been allowed to occupy, he took upon himself to let.

13. The spoil which was laid on the field being chalk, the persons who entered into the occupation of it were able by manure and other means to make it productive, and vegetables and garden produce were grown on parts, and tolerable crops of corn, beans, and other farm produce on other parts of it.

14. The deposit of chalk and spoil was completed without covering the whole of the field, and there was left a margin or portion to the north and east uncovered, containing about two acres, and neither that portion nor the part covered with chalk has ever been occupied since the railway was made, in any manner or for any purpose, except as already mentioned, and except that the defendants, in the year 1869, extended their coal sidings into a portion of the field, such portion, however, being no part of what is claimed by the plaintiffs.

15. In the year 1868, the company required the persons occupying parts of the field as before mentioned, their number being about fourteen, to pay small rents to the company for the portion occupied by them respectively, and they have since paid, and the company have received such rents. Previously to the year last mentioned the company had not called for nor received any rent. The whole quantity of land for which such rents are paid is 9a. 3r. 14p., and the aggregate amount of rent is 12*l.* 4*s.* 2*d.*

1872

MAY
v.
GREAT
WESTERN
RAILWAY CO.

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

16. The only agreement in writing relating to any part of the land in question, was one made on the 4th of November, 1868, between Thomas Laughton, as agent for the defendants, of the one part, and Charles Hewitt of the other part, whereby the defendants agreed to let to Hewitt three pieces of arable land, containing together seven acres or thereabouts, at the clear yearly rent of 12*l.* 10*s.*, from the 29th day of September then last, upon certain terms and conditions, and amongst others that the tenancy thereby created might be determined by either party giving to the other of them three calendar months notice in writing previous to or for quitting, such notice to expire on any quarter day, and in the event of the defendants requiring the whole, or any portion of the premises for the purposes of the railway or works connected therewith, then, and in such case, the defendants should be entitled to take possession of the same upon giving twenty-eight days notice in writing, and might by themselves, their agents, and servants, enter upon the premises without being deemed trespassers for so doing, paying the tenant the value of the crop. The land comprised in the above agreement, included from two to three acres of the land sought to be recovered in this action.

17. The close of land situate to the north of that portion of the northern boundary of the field, which is shewn on the plan (1) extending from G to B, and immediately adjoining thereto, contains 37*a.* 0*r.* 33*p.*, and was at the time of the purchase of the field by the defendants the property of Jane May, John Simonds, and Charles Simonds, and by an indenture dated the 4th of June, 1860, the same was conveyed to the plaintiffs, Thomas May and John May, as tenants in common, and continued to be vested in them until the 18th June, 1867, on which day they conveyed the same to said John Burgess Soper in fee. G B is not the whole southern boundary of that close, it extends further westward. The piece of land sought to be recovered from the defendants was not included in this conveyance.

18. In the month of March, 1868, by an arrangement between the defendants and Soper, a strip of the field on the west side was cut off and made into a road, which road led to the property of Soper to the north, and was also useful to the defendants the

(1) See plan post facing p. 371.

railway company as forming a shorter and more convenient way from their station to the neighbourhood of Basingstoke; this road was made by Soper, the railway company providing gravel. There was no conveyance or other deed executed on the occasion, and the soil of the road continued to be in the railway company; the road is private, never having been dedicated to the public.

1872
MAY
v.
GREAT
WESTERN
RAILWAY Co.

19. At or about the same time that the defendants purchased the field, they also purchased certain other land abutting thereon on the west for the entire length thereof (being the land coloured pink on the plan) (1) from Magdalen College, the then owners of the same; it was purchased for the same purpose as the first-mentioned field was purchased for, viz., the deposit of spoil from the said cutting, and was used for that purpose in the same way, and such last-mentioned land has since been dealt with by the defendants in manner following, that is to say:—

20. On the plan this land is shewn in three pieces, the one nearest the north, containing 3r. 6p., was, on the 1st of August, 1855, sold and conveyed by the defendants to Messrs. Henry Downes and others, who shortly after conveyed the same to the burial board of Basingstoke, who are the present owners, and it now forms part of the cemetery for their parish.

21. The middle piece, containing 1000 superficial square yards, or thereabouts, was, in the year 1867, conveyed by the defendants to trustees for the Society of Friends, who since that period have used it for the purpose of a burial-ground, and the same is now used and occupied by the society for that purpose.

22. The remaining portion being the piece to the south, is retained by the defendants, and has for several years past been by them let, at certain yearly rents, to one or more of their servants, or others, who use and occupy the same for garden and agricultural purposes.

23. Section 127 of the Lands Clauses Consolidation Act (8 Vict. c. 18) incorporated in the Act first above mentioned, enacts, “And with respect to lands acquired by the promoters of the undertaking, under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows: Within the prescribed period,

(1) See plan post facing p. 371.

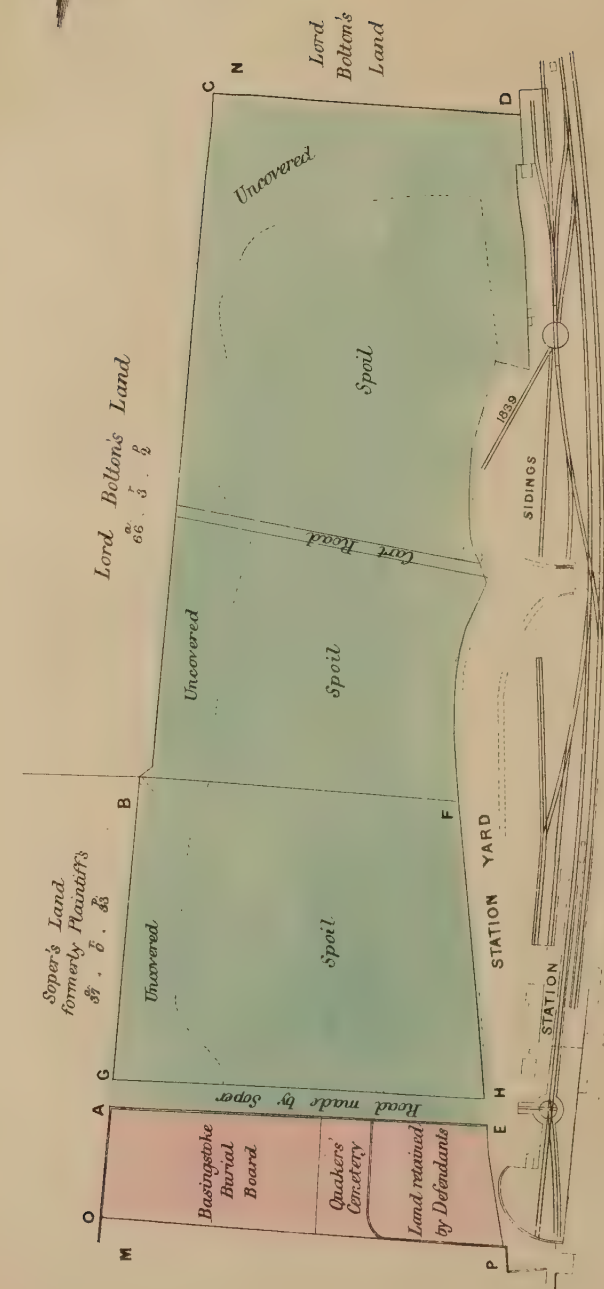
1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

or, if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special Act; and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same.

24. By s. 41 of the Great Western (Lightmoor to Colebrookdale) Act, 1861 (24 & 25 Vict., c. cciv.), which received the royal assent on the 1st of August, in that year, it is enacted as follows: "The periods respectively limited by the various existing Acts of the company and by the Lands Clauses Consolidation Act, 1845, therewith incorporated, for the sale of superfluous lands and belonging to and vested in the company within the several parishes enumerated in the schedule to this Act annexed, shall be and the same are hereby extended to the further period of seven years from the passing of this Act." Basingstoke is one of the parishes enumerated in the schedule.

25. By the Great Western Railway Act, 1868 (31 & 32 Vict. c. cxlv.), s. 20, which received the royal assent on the 31st of July, 1868, it is enacted that "The company may, notwithstanding anything to the contrary in The Lands Clauses Consolidation Act, 1845, or in any Act relating to the company, with which that Act is incorporated, retain and hold any lands belonging to them in the parishes enumerated in the schedule A. to this Act, and which have not yet been applied to the purposes of the company, for the period of ten years after the passing of this Act; but the company shall at the expiration of that period sell and dispose of all such parts of those lands respectively as shall not then have been sold or disposed of, or applied to, or are not then required for the purposes of their undertaking. Basingstoke is one of the parishes mentioned in schedule A.

26. The land, which on the north adjoins the remainder of the northern boundary of the field of 15a. 0r. 33p. purchased by the defendants as hereinbefore mentioned, and on the east adjoins the



eastern boundary thereof, is the property of Lord Bolton, and altogether contains 66a. 3r. 2p. On the south, what remains of the field is now bounded for its entire length by the station, roads, and works of the railway company.

27. The annexed plan was to be taken as part of the case, with the following explanation: From A to C is the whole northern boundary of the first-mentioned field purchased by the company; A E and C D are portions still visible of the east and west boundaries respectively; the rest of those boundaries and the southern boundary are not shewn, the southern portion of the field having been absorbed by the railway, the station, and other works, the portion of the field not so absorbed, is coloured green. The strip between the lines A E and G H is the road formed by John Burgess Soper and the company in 1869. The land coloured pink is the land purchased by the defendants from Magdalen College, the northern portion of it is that sold by the defendants to Henry Downes and others, and by them conveyed to the Basingstoke Burial Board; the middle portion is that sold to the Society of Friends, and now the Quakers' Cemetery and the lower portion is that retained by the defendants. The lines G B, H F, G H, and B F, contain and shew the piece of land sought to be recovered in this action; there is no actual division of the land at B F, that line being put on the plan only to shew the extent of the plaintiffs' claim. The land to the north of G B, is that which formerly belonged to plaintiffs and others, sold to John Burgess Soper in 1867. The land to the north of B C and to the east of C D, is the land belonging to Lord Bolton. The land to the west of the pink belongs to other proprietors not being either of the parties to this action. The dotted lines running across the field nearly at the north boundary, and at the east end, curving down nearly to the south boundary, shew the extent to which the spoil covered the field, the space outside those lines to the north and east being what was left uncovered. A straight line, if drawn across the plan from the point M to the point N, will cross the field near the northern boundary thereof, and will represent the line of deviation laid down on the plan deposited on the application for the first-mentioned Act.

28. The extent of the land coloured green is about ten acres,

1872

MAY

v.

GREAT
WESTERN
RAILWAY CO.

8QB.27

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

the portions uncovered by spoil amount to about two acres, and the piece claimed by the plaintiffs measures about four acres.

29. The following are the measurements of the several boundaries. From H to G 441 feet; from G to B 357 feet; from B to C 814 feet, and from C to D 364 feet. From H to D is about equal to G C.

30. The writ of ejectment commencing this action was issued and tested on the 10th of June, 1869; since that time, viz., on the 17th of January, 1870, the plaintiff, Thomas May, died.

31. The plaintiffs contend that so much of the field purchased by the defendants in the year 1847 as has been and is occupied for the purposes and in the manner hereinbefore mentioned, and as abuts on the boundary line G B, is superfluous land within the meaning of s. 127 of the Lands Clauses Consolidation Act, 1845; and that the plaintiffs, who from the 4th of June, 1860, down to the year 1867, were the owners of the said close abutting to the north (from G to B) on part of the said field coloured green, were and are entitled by reason of such ownership to recover possession of so much of the field coloured green as adjoins their boundary, viz., the piece G B F H.

32. The defendants, on the other hand, contend that the land claimed by the plaintiffs was not, nor is, superfluous land within the meaning of s. 127, and that if the lands were superfluous lands within the meaning of the section, the plaintiffs are not entitled to recover them.

33. The Court are to have the same power of drawing inferences of fact as a jury would have.

34. The question for the opinion of the Court is, whether the surviving plaintiff is entitled to recover possession of the whole or any, and what part of the piece of land claimed in the writ.

Pinder (H. T. Cole, Q.C., with him) for the plaintiffs. The first question turns on the construction of s. 127 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18). If the land in question was acquired by the defendants under the provisions of their Acts, and not required for the purposes thereof, then it is superfluous land; and not having been sold within the time prescribed by that enactment—ten years after the expiration of the time limited for the

completion of the works, that is, on the 30th of June, 1860—it has become vested in the plaintiffs as owners of the adjoining lands. The case is governed by *Moody v. Corbett*. (1) It is admitted that land taken by private agreement is not within s. 127. It was so decided in *City of Glasgow Union Ry. Co. v. Caledonian Ry. Co.* (2) But the land in this case was taken under the compulsory powers of the Act; notices to treat pursuant to the Acts were given, and both parties acted as if the defendants were purchasing the land under their compulsory powers. No doubt, part of this superfluous land is beyond the limits of deviation; but the notice to treat comprised the whole of the land taken, and it was taken de facto. The defendants ought not therefore to be permitted to say that land which they had purchased under their compulsory powers was purchased by private agreement, especially when their object is to defeat the intention of the legislature. In *Lord Carington v. Wycombe Ry. Co.* (3) the question was, whether the owner of the adjoining land was entitled to pre-emption of superfluous land, and the argument was that the purchase was a compulsory one, and not a purchase by agreement. Lord Cairns, L.J., says, “It was land acquired de facto under parliamentary powers,” and Selwyn, L.J., says, “The transaction commenced with the usual notice to treat given in the ordinary exercise of the company’s compulsory powers; and I think the legislature cannot be considered as having intended to deprive a landowner of the right of pre-emption, because after having received such a notice he comes to an agreement with the company on the price to be paid.” Those observations are in point here. By 8 & 9 Vict. c. xl. s. 16, the private Act of the defendants, after reciting, “Whereas plans and sections of the railway, shewing the line and levels thereof, and also books of reference containing the names of the owners, lessees, and occupiers . . . of the lands through which the same is intended to pass, have been deposited with the clerks of the peace for the counties of Berks and Southampton,” it is enacted “that it shall be lawful for the company to make and maintain the railway and works in the line and upon the lands delineated on the plans and described in the

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

Post 382

(1) Law Rep. 1 Q. B. 510.

(2) Law Rep. 2 H. L. Sc. 160.

(3) Law Rep. 3 Ch. Ap. 377.

(4) 162 JCL 2/382.

(5) 162 JCL 2/387

1872

MAY

v.

GREAT
WESTERN
RAILWAY CO.

books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose;" and according to par. 5 of the case, all the land taken was included in the plans and books of reference deposited. That shews that the defendants may purchase the land delineated on the plans, but they are not to make a line beyond the limits of deviation. That a railway company can purchase land beyond the limits of deviation is decided in *Doe d. Armitstead v. North Staffordshire Ry. Co.* (1); and the decided cases shew that in certain cases a company can use such lands, if they are necessary for the purposes of forming stations or other works of a similar character: *Hodges on Railways*, p. 445, 2nd ed. All the lands were taken under notices to treat; the landowners did not know for what purposes they were required, and the defendants cannot now say that the land was not acquired under the provisions of their Act. Secondly, the land is not required for the purposes of the Act. On what ground can it be said that land which is let out as gardens is required for the purposes of the Act? The argument for the defendants will be, that the land is required for the purposes of the Act, because it has been used for depositing chalk and spoil on it. A definition of the words, "required for the purposes of the Act," is to be found in *Lord Beauchamp v. Great Western Ry. Co.* (2) Wood, L.J., says: "I take it that whatever the company are compelled to do is a plain purpose of their Act, though it may be well argued it is not a purpose of the Act to do, for their own accommodation, anything which they are not compelled to do, and accordingly, though s. 45 of the Railways Clauses Consolidation Act gives power to purchase land for extraordinary purposes, it does not give the company power to take it compulsorily, the acquisition of land for those extraordinary purposes not being essential to the undertaking." The purposes of the Act are those things which the defendants, under the Railway Clauses or Lands Clauses Acts and their Special Acts, are compelled to do. If the land is required for any of these purposes, it is land required for the purposes of the Act, although it is not required for the purposes of the railway. If that test be applied to the present case, it is clear that this land

(1) 16 Q. B. 526; 20 L. J. (Q.B.) 249.

(2) Law Rep. 3 Ch. Ap. 745, at p. 750.

is not required for the purposes of the Act. *Lund v. Midland Ry. Co.* (1) is an authority for saying that the plaintiffs could not have resisted the sale of the land to the defendants for the purpose of depositing spoil; but it would appear from the facts of that case that it is the invariable custom of railways to sell as superfluous lands land purchased for the purpose of depositing spoil. Suppose a company in want of bricks bought a field and dug out the earth to make bricks, and then levelled the field, could it be contended that, although they bought the field to make bricks, it is land required for the purposes of the Act? Surely it becomes superfluous land within s. 127. So land, bought with the intention of making a road for the passage of carts to the works during the construction of the railway, or for the purpose of building houses for the workmen, when the object was accomplished, would be superfluous land. Lastly, a part of the field has never been covered with deposit; as to that, the plaintiffs are clearly entitled to recover.

The second question is whether the plaintiffs' right to the land is defeated by the Acts of 1861 (24 & 25 Vict. c. cciv.) and 1868 (31 & 32 Vict. c. cxlv.), mentioned in parr. 24 and 25. The plaintiffs had a vested title on the 30th of June, 1860, and those Acts can have no retrospective operation; that point was decided in *Moody v. Corbett*. (2) The words of the Act of 1861 are the periods for the sale of superfluous lands "belonging to and vested in the company," shall be extended to a further period. Thirteen months before the passing of that Act the lands had ceased to belong to or be vested in the company, because, by virtue of s. 127 of the Lands Clauses Consolidation Act, they had already vested in the plaintiffs as the owners of the adjoining lands. If it was the intention of the legislature to divest lands already vested, it would have used clear and unambiguous language. These Acts are applicable only to lands still belonging to and vested in the defendants, and which had not at the time of the passing of those Acts come within the operation of s. 127 of the Lands Clauses Act.

Assuming that the plaintiffs are entitled to recover, they will recover in the proportion laid down in the judgment in *Moody v. Corbett*. (2) One of the plaintiffs having died since the writ issued,

(1) 34 L. J. (Ch.) 276.

(2) Law Rep. 1 Q. B. 510.

1872

MAY

v.

GREAT
WESTERN
RAILWAY CO.

it is admitted that, as they were tenants in common, the survivor can only recover a moiety of the land claimed.

Manisty, Q. C. (Raymond with him) for the defendants. The first question is, whether the land in question is "superfluous land" within s. 127. Land acquired by a railway company under the provisions of their Acts, for the purposes of their undertaking, and which has been bonâ fide applied, within the limited period, to those purposes, does not become "superfluous land" when it has ceased to be so applied. If a company purchase land for the construction of their works, and on the completion of the works they have land in excess of what was ever wanted, that land is superfluous and must be sold by them; but land which has once been used for the purposes of the railway does not come within s. 127, and is not superfluous. The test is whether the land has been used for the purposes of the railway; if it has, it cannot be said to be land not required for those purposes. This land was taken under compulsory powers, for the purposes of the undertaking; it was used to deposit the material taken from a cutting in carrying out the works, and the material deposited may be required for ballasting the line. If land can at a future period be applicable to the purposes of the railway, it is not "superfluous land." It is stated in the case that in 1869 it was necessary to make a coal siding in part of the land; other parts may be required for other purposes; it is near to a terminal station where the traffic is increasing, and it may be required for enlarging the station. There may not be any immediate necessity for its use, or any actual contemplated use, but there is the strongest probability, almost amounting to certainty, that it will be required for the purposes of the railway. It never can have been the intention of the legislature that, under such circumstances, land should be sold and repurchased at an enhanced value; only on a very narrow construction of s. 127 can it be said that land so circumstanced is not required for the purposes of the undertaking. The fact of the defendants not having sold the land is evidence that they bonâ fide believed it would be required. The language of the Private Act of 1868 (31 & 32 Vict. c. cxlv.), in par. 25 of the case, throws some light on the meaning of s. 127. The words are: "The company may, notwithstanding anything to the contrary in the Lands Clauses Consolidation Act, 1845, retain and hold any

lands belonging to them, and which have not been applied to the purposes of the company," shewing that lands which have once been applied to the purposes of the company were not considered as within the operation of s. 127.

The second question is, whether 31 & 32 Vict. c. cxlv., does not give the defendants ten years from its passing (1868), in which to sell the lands. In effect, it enacts that notwithstanding anything in the Lands Clauses Consolidation Act, 1845, the defendants may retain and hold any lands belonging to them in the parishes enumerated in schedule A; and the parish of Basingstoke, in which this land is situate, is one of the parishes.

[COCKBURN, C.J. How can that Act divest land which by virtue of the Lands Clauses Consolidation Act has vested in the owner of the adjoining lands?]

No doubt the term "belonging to" is an ambiguous expression; but the Lands Clauses Consolidation Act cannot vest the land in the adjoining owner in invitum whether he pleases or not. The law cannot give a man an estate against his will. Suppose the land was a *damnosa hæreditas*, or there was a nuisance on it, or it was subject to onerous rates, is the adjoining owner to be liable to an indictment or to the payment of the rates? The superfluous land does not vest in the owner of the adjoining land until he has done some act to shew he has elected to take it. Here no claim has been made until after the passing of the Act of 1868, and then by a person who is not now the owner of the adjoining land.

With regard to the margin of the field left uncovered by the spoil, it is a narrow strip which runs the whole length of the field and the adjoining land. Substantially the spoil is laid on the whole of the land, it is not necessary that every atom of land should be covered with spoil, it is prudent, if not necessary, to leave a margin.

Pinder was not heard in reply.

COCKBURN, C.J. I think that our judgment should be for the plaintiffs. We have to put a construction on s. 127 of the Lands Clauses Consolidation Act, and to see how far that clause applies to the present case.

It appears to me that what the legislature intended—and we

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

have nothing to do with the policy of the enactment—was that railway companies requiring land for the purposes of their undertaking, and being authorized by parliament to acquire it, as they very frequently may make an erroneous calculation as to the quantity of land which they require to take, shall not—if they have acquired land under the authority of their Acts, which turns out to be more than they want, or which having been required for some particular purpose which has ceased to exist, is no longer necessary for the purposes of the railway—be allowed to hold in their hands lands thus superfluous and not required for their undertakings. We have nothing to do with the policy, as I have said, of that legislation. The only question we have to decide is, whether the terms in which the enactment is framed are applicable to a case like the present; and I must say I think that they are. The words seem to me to be simple enough. They are that where the promoters of an undertaking have acquired land under the provisions of an Act of Parliament, but which shall not be required for the purposes thereof, then within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands. The words “superfluous lands” are synonymous with land, according to the previous expression, “not required for the purposes of the undertaking.” The promoters are to sell such “superfluous lands;” and if they do not, they are subjected to a penalty, which is evidently intended to enforce compliance upon their part with the terms of the enactment: they are liable to the forfeiture of the land, which is to become, at the expiration of that period, the property of, and vest in, the owners of the land adjoining.

It was contended for the railway company, that if, at any time after the passing of the Act authorizing the acquisition of the land, the land said to be superfluous had been applied to any use connected with the railway, that would enable the company in all future time to retain the property and the possession of such land. I cannot think that that can have been what was intended by the legislature. The object, evidently, was to prevent land, not required for the purposes of railway undertakings,

from remaining vested in the hands of these companies, who are only empowered and authorized to acquire land for the purposes of their undertaking. It was further contended that, if by any possibility the land in question could be brought to be applicable, or might become applicable, at any future time, to the purposes of the railway, that would be sufficient to warrant the company in not selling the land as superfluous. In that, again, I cannot agree, except to this extent, namely, that if looking to the surrounding circumstances of the company and the present—I will not say immediately present, but still the proximate—possibility within reasonable contemplation, there shall be reasonable ground to believe that the land in question will become available for the purposes of the undertaking, it is not because there may not have been up to the moment of the expiration of the ten years, or at the actual moment of that expiration, an immediate application of the land to the purposes of the undertaking, you are to shut your eyes to the fact that it will certainly become available for such purposes; and I think that under such circumstances it would be perfectly legitimate and proper to say that the land is still required for the purposes of the undertaking, and therefore is not superfluous land within the meaning of the section. Again, I cannot think that if a certain quantity of land has been taken within the provisions and powers of the Act, as specified in the plans, and it turns out that only a portion of that land is required for the purposes of the railway, the entire quantity is to be treated as one undivided whole, and that, because out of a given number of acres taken for a particular purpose connected with the undertaking, a certain portion has been found to be required, therefore all the rest will follow the conditions of that part, and may be said to be acquired for the purposes of the railway. Suppose the defendants had taken, as in the present case, fifteen acres, and required only two; while those two would be protected, the other thirteen would acquire and have the character of superfluous land.

Then comes another question upon which my opinion is decidedly against the defendants' argument. It is said that this land was taken by the company for the purpose of putting on it the spoil which resulted from the cutting and operations in constructing the railway, and having once been used for that purpose it remains to

1872

MAY

v.

GREAT
WESTERN
RAILWAY CO.

24BD34

1872

MAY

v.

GREAT
WESTERN
RAILWAY CO.

all time land required for the purposes of the railway. Now, in the first place, a distinction is to be made between so much of this land as has been covered with spoil, and so much as has not been applied to that purpose. With regard to the latter, it has never been applied to any purposes of the railway. It will, therefore, come without any possibility of doubt within s. 127. As to that part, which has been used for the purpose of depositing the spoil, that part, no doubt, was, at the time it was made available for that purpose, land required for the purposes of the railway in one sense, the construction of the railway requiring that there should be some ground on which the spoil should be deposited. But that purpose has been accomplished, and now the land, having acquired a certain degree of fresh fertility, is made available for agricultural or horticultural purposes, and is not wanted in any sense of the term for the railway itself, or for the purposes of the company. On the contrary, the company let it out as gardens, and take a rent for it. How can it be said that this land is any longer required for the purposes of the undertaking? It was required in time past, but it has ceased to be so: therefore it is land in the hands of the company not required for the purposes of the undertaking, and therefore is "superfluous." Under these circumstances, they are bound to sell it within the prescribed period. It seems to me immaterial whether the land is or is not within the limits of deviation. All the land was acquired under the company's Acts, and it therefore comes within the terms of s. 127, if it ceases to be required for the purposes of the undertaking. If on the facts of the case there was any reasonable expectation that this land would be wanted for the purposes of the railway, it might then be fairly said to be excepted from the operation of s. 127. But there is nothing in the case that leads to such a supposition: there is nothing that would lead one to suppose that this land is likely to become available and useful to the railway. It is not enough to say that a road has been made over it, or that a bit of it has been applied to the purposes of a siding. So far as those pieces of land are concerned, it may be said that the application to those purposes, though quite at a recent period, might have fairly led us to the inference now, at the expiration of the ten years, that those bits were still required for the purposes of the undertaking; but it is not because a very

little bit of a large close of land may be required, that the whole is required.

Then comes the question whether, under the operation of the private Act of 1868, the defendants can say that the legislature has intended to protect them against the forfeiture that would otherwise have occurred under s. 127. But the provision in the private Act refers, I think, only to land belonging to the company. By s. 127 of the Lands Clauses Act, the land at the expiration of the prescribed time becomes by force and operation of the statute taken out of the company and vested actually, so as to become the property of the owner of the adjoining land. The term "belonging," used in the private Act of 1868, may be more or less ambiguous. I think it ought to be construed as against the company, who obtained the private Act without notice to the parties who have in the meanwhile acquired vested rights, and I should certainly say that the legislature, if they had intended to take away vested rights, and restore the ownership of this property to the company as though those rights had never vested in others against them, would have used clear and distinct language to shew that such was their intention. This may be a hardship upon the company, but with that we have nothing to do: not that I admit it to be a hardship, because the legislature having made it imperative upon railway companies to sell superfluous lands, the company, knowing this, are not taken by surprise. They know that if they do not sell within the time prescribed, they run the risk of forfeiture. I think the legislature intended that railway companies should carry the enactments as to selling superfluous land into effect, and a company have only themselves to blame if they incur a forfeiture by their neglect. On these grounds I think our judgment must be for the plaintiff.

BLACKBURN, J. I have come to the same conclusion as my Lord. By s. 127 it is very plain that superfluous land is, before the end of the prescribed period—which in this case would be in 1860—to be sold by the company, and if not sold, it is to vest in the owners of the adjoining lands. Evidently the intention of the legislature is to compel companies to sell superfluous lands within the prescribed period. This is somewhat analogous to the right of entry for a

1872

MAY

v.

GREAT

WESTERN
RAILWAY CO.

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

forfeiture; an interest in the land is vested in the owner of the adjoining land, to be enforced against the company if they do not sell the superfluous land.

Then the question is, whether these lands are superfluous lands, which ought to have been sold, and not having been sold, are forfeited. To bring the case within s. 127, the land must have been acquired by the promoters of the undertaking under the provisions of the Lands Clauses Act, or some Act incorporated with it. The greater part of the land in question—all that part within the limits of deviation—was taken under the notice to treat, and therefore was land acquired under the provisions of the company's Act. But was that part, which, though marked on the parliamentary plan, was without the limits of deviation, acquired under the provisions of the Act? I think it very clear that when a company buys land by agreement, and not under the compulsory powers of the statute, it never was intended by the legislature that such a case should come within s. 127; and it has been so decided in *City of Glasgow Union Ry. Co. v. Caledonian Ry. Co.* (1). When, however, reference is made to s. 16 (2) of the private Act (8 & 9 Vict. c. xl.) it seems to me that the promoters may buy land though the land be beyond the limits of deviation. "They may enter upon, take, and use such of the said lands as shall be necessary for such purpose." The words "such of the said lands," from the collocation, mean the lands numbered on the parliamentary plan. Consequently, I take it that the land marked upon the plan, though beyond the limits of deviation, may be acquired under the provisions of the Act: and the reason of this may be, that the legislature thought it might be convenient for the company to have additional land during the time the works were going on. I come, therefore, to the conclusion that all the lands in question were acquired under the provisions of the Act of Parliament. Then what is the meaning of the words in s. 127—"which shall not be required for the purposes thereof"? Mr. Manisty argued that if land has once been used for the purposes of the undertaking it cannot be said that it has not been required. That is not the meaning of the words.

(1) Law Rep. 2 H. L., Sc. 160.

(2) See the section at length in the argument of counsel, ante, p. 373.

RQB.B.
2QB.D.343

There is a distinction between "required" and "used." What the legislature intended was, that land which was retained and kept for the purposes of the railway—in that sense required—and not land which had merely been once used, should not be sold. I think the section means, not required at the time when the period for selling it arrives; and the question would be, whether at that time the land was "required." The company might have hired land for the temporary purpose of depositing spoil; and though they used it for a temporary purpose, they did not in 1860 require it for the purposes of their undertaking. They altered the features of the land and improved the surface, and rendered it more valuable; but still it was land not required for the purposes of the Act. I agree that the land need not be in actual use by the company at the time they are to sell it. If it was contemplated to enlarge the station, and the land was to be appropriated to that purpose, then it might be argued that the land was not superfluous land within the section; but no facts are stated in the case which would warrant us in drawing any such conclusion.

Upon the other question the facts are that the plaintiffs had become entitled to the land in question, which in point of law was vested in them, and they had the right to enter upon it; but they had not exercised that right, and the railway company were in actual possession, and as against everybody, excepting the plaintiffs, were owners of it. Under these circumstances, the defendants were promoting an Act of Parliament (the 31 & 32 Vict. c. cxlv.); and I think, from the words used, it is pretty plain that the framer of the section relied on had a case like the present in contemplation, and wished to protect the interests of the company. I do not say that the object was iniquitous or absurd, or one that the legislature would have refused to entertain. In *Moody v. Corbett* (1) I thought it wrong in a railway company to obtain an Act of Parliament to undo a verdict where a claimant had brought ejectment, and I thought in attempting to do so the company intended to deceive the legislature; but I do not think there is the slightest impropriety in a railway company seeking to retain superfluous land, which had vested in the owners of the adjoining land, and in respect of which those owners had a right of entry, but had never

(1) Law Rep. 1 Q. B. 510.

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

exercised it. I think, if the company had made such an application, the legislature would most likely have required that notice should have been given to the adjoining owners. The words of the enactment in the present case are that, notwithstanding the Lands Clauses Consolidation Act, or any Act relating to the company with which that Act is incorporated, "the company may retain and hold any lands belonging to them, which have not yet been applied to the purposes of the company, for the period of ten years after the passing of this Act." In one sense I quite agree that the word "lands belonging to them" might be construed to mean lands that belonged to the company as against all the world except the person having a right of entry which he had not exercised. Mr. Manisty urged that, inasmuch as an estate cannot be given to a man against his will, the superfluous land did not vest in the owner of the adjoining land until he had by his act elected to take the superfluous land; and that before the owner of the adjoining land could enter upon the superfluous land a demand of possession ought to have been made on the defendants. I do not agree with this argument. I think that, where by a private Act it is sought to take away property which has become vested in another, the language used should be clear to shew that such was the intention of the legislature. *Moody v. Corbett* (1) was decided on this principle. I think that the defendants in their private Act (31 & 32 Vict. c. cxlv.) have failed to effectuate their purpose. If the clause had enacted "that the adjoining owners who have not entered on the superfluous lands shall not enter," I do not see how we could have said otherwise than that the clause was to operate to defeat the plaintiffs' claim. But no such words are used, and I think we ought not to construe an Act as taking away vested rights unless the language is clear to shew that such is the intention of the legislature. For these reasons I think the plaintiff is entitled to our judgment.

MELLOR, J. I am also of the same opinion. I quite agree that the expression "superfluous lands" means "lands not required for the purposes of the Act." During the argument I thought that the words "superfluous lands" might have the meaning which the

(1) Law Rep. 1 Q. B. 510.

defendants wished to put on them. I thought that those words might be limited to lands which may have been taken by a railway company with the intention of applying them to the purposes of their Act, and which have not been so applied on finding they were not wanted. But that, when they had taken and used land for depositing spoil, it did not come within the meaning of the section. But I have, for the reasons already stated, come to a different conclusion. *Lund v. Midland Ry. Co.* (1) decides that a landowner is compelled to part with his land to a railway, if they require it, to deposit spoil and materials upon it during the construction of the railway; yet the provisions of 8 Vict. c. 20, ss. 32-45, which empower railway companies to enter upon land for the purpose of depositing spoil, treat land entered upon for the deposit of spoil as occupied only for a temporary purpose. The purpose for which the land was used was simply to deposit the material excavated during the making of the railway; that purpose having ceased, and there being no apparent object which the defendants can have for retaining the land so used as a spoil bank, I think, as they have ceased to use it for the purpose of depositing spoil, and let it out at a rental, it can no longer be said to be required for the purposes of the Act. Then, if that be so, and the ten years have expired, and nothing has been done upon the land to shew that it is necessary to retain it for the purposes of the Act, the case is within s. 127, and the land vests in the owner of the adjoining lands. I do not think Mr. Manisty is right in saying that an act of the person claiming is necessary before the land becomes vested. No person would repudiate an accession of property, which cannot be to his disadvantage in any sense, but may be to his advantage. The section says, at the expiration of such period the land shall thereupon—that is, the expiration of the period—vest in and become the property of the owners of the lands adjoining thereto. I think, therefore, there is no foundation for that argument.

With regard to the other question, I am satisfied that it was not intended to take away or destroy the right which had become vested in the owner of the adjoining land, so vested that it has become his property. I think this would require stronger words

(1) 34 L. J. (Ch.) 276.

1872

MAY
v.
GREAT
WESTERN
RAILWAY CO.

1872

MAY
v.
GREAT
WESTERN
RAILWAY CO.

than the words used in the private Act; and I think the construction right which has been put upon the Act by the other members of the Court.

QUAIN, J. I also agree that the plaintiff is entitled to judgment. Upon the construction of the Act of 1868 I feel no doubt. It would be extremely dangerous to construe the general words of a private Act so as to do away with a vested right, when the owner of that vested right had no notice and was entitled to no compensation under the statute. I agree the lands in question were acquired under the Act of Parliament, although a part may be beyond the limits of deviation, and I cannot concur with Mr. Manisty that, if they were at any time used for the purpose of the undertaking, notwithstanding they may afterwards have ceased to be so used, they are not superfluous lands under s. 127. That construction would have the effect of repealing the statute and directly contravene the policy of the legislature. The result is that we come to the question of fact, were these lands lands that were required for the purposes of the Act either in 1860 or even down to the time when this action was brought? I regret that that question should have been left to us as a question of fact. In *Doe d. Armitstead v. North Staffordshire Ry. Co.* (1), this Court held that whether lands were necessary or not for the purposes of a railway was a question for a jury. We have therefore to decide on the bare facts of this particular case, and I rest my judgment upon them. Can we say, as a matter of inference from the evidence, that these lands were required for the purposes of the Act? I think the evidence is conclusive that they were not required. In the first place, it is expressly stated they were originally bought for the sole purpose of putting spoil upon, and that is a temporary purpose, and may cease, and has ceased. They were let out as gardens, and it is found expressly in the 14th paragraph of the case that they were never used for the purposes of the Act down to 1860; and from 1860 to 1869, for nine years, they were never required in any sense for the purposes of the company. Under these circumstances, and on that particular finding, I do not see how we—to whom the matter is rather referred as a matter

of fact—can find they ever were required for the purposes of the Act. But if the fact had been found that, although the company did not use the land in 1860 for the purposes of the Act, they contemplated extending their station, and they would finally require them for the purposes of extending their railway, then I think the case would have presented a different aspect; but that not being stated, I cannot see there is any evidence that they were required at the time this action was brought. Upon that ground I think the plaintiff is entitled to judgment.

1872
MAY
v.
GREAT
WESTERN
RAILWAY CO.

Judgment for the plaintiff.

Attorneys for plaintiff: *Johnson & Weatherall.*

Attorneys for defendants: *Young, Maples, & Co.*

THE QUEEN v. THE LORDS COMMISSIONERS OF THE TREASURY.

Jan. 29.

Mandamus—Servants of the Crown—Costs of Criminal Prosecutions—Annual Appropriation Act, 1871 (34 & 35 Vict. c. 89), s. 3, sch. B., part. 7, class 3—29 & 30 Vict. c. 39, s. 14.

By 29 & 30 Vict. c. 39, s. 14, when any sum of money shall have been granted to Her Majesty by Act of Parliament to defray expenses for any specified public services, it shall be lawful for Her Majesty from time to time, by order under the sign-manual, countersigned by the Treasury, to authorize and require the Treasury to issue out of the credits granted to them the sums which may be required to defray such expenses not exceeding the amount of the sums granted.

By the Annual Appropriation Acts, out of the sums granted to Her Majesty for the service of each year, a certain sum is applied to defray the charges “for prosecutions at assizes and quarter sessions, in England, formerly paid out of county rates.”

In the half year ending the 31st of December, 1870, certain prosecutions took place at the assizes and quarter sessions of the county of L., and the costs were taxed by the proper officers under the orders of the respective Courts, and the treasurer of the county paid the bills, and returned the bills, with the usual vouchers, to the Treasury. The Lords of the Treasury had appointed certain officers called the Examiners of Criminal Law Accounts, and these officers disallowed or reduced in amount fifty-one of the items in the bills returned; and a rule nisi was then obtained for a mandamus to the Lords of the Treasury, commanding them to issue a Treasury minute authorizing the paymaster of civil contingencies to pay to the treasurer of the county of L. the sums disallowed:—

Held, that a mandamus would not lie, inasmuch as the Lords of the Treasury received the money, which was granted to Her Majesty, as servants of the Crown,

1872
 THE QUEEN
 v.
 LORDS COM-
 MISSIONERS
 OF THE
 TREASURY.

and no duty was imposed upon them as between them and the persons to whom the money was payable.

Hell, also, that the course which the Lords of the Treasury had pursued was erroneous, as they had no authority whatever to have the bills retaxed, and ought to have paid over to the treasurer of the county the full sum which he had expended as costs of prosecutions.

RULE calling upon the Lords of the Treasury to shew cause why a writ of mandamus should not issue commanding them to issue a Treasury minute or authority to the paymaster of the civil contingencies, or other proper officer, directing and authorizing him to pay, or cause to be paid, to the treasurer of the county palatine of Lancaster certain sums specified in a schedule annexed.

It appeared, from the affidavits upon which the rule was obtained, that during the half year ending the 31st of December, 1870, certain prosecutions had taken place at the assizes and quarter sessions of the said county, and also certain adjudications under the Criminal Justice and Juvenile Offenders Acts. The bills of costs had been taxed by the proper officers under the orders of the respective Courts. The treasurer of the county had paid the bills, and had returned the bills, with the usual vouchers, to the clerk of the peace, who had duly forwarded them to the Treasury. The Lords of the Treasury had appointed certain officers called the Examiners of Criminal Law Accounts (1), and these officers had disallowed or reduced in amount fifty-one of the items in the bills returned, one or two of the items disallowed having been allowed by the express order of the presiding judge; others were items of costs expressly allowed by statute; and it was for the purpose of obtaining payment of the amount (100*l.*) of those fifty-one items that the rule was obtained.

It was further sworn that it was believed that the sum appropriated to the payment of these costs under the Appropriation Act, 1871 (34 & 35 Vict. c. 89, sch. B., part 7), was still unexpended. (2)

(1) On the argument the Solicitor General stated that these officers had been first appointed in 1857.]

(2) The Appropriation Act, 1871 (34 & 35 Vict. c. 89), s. 3, enacts that all sums granted by this Act and the Acts in sched. A, out of the Consoli-

dated Fund towards making good the supply granted to Her Majesty, are appropriated as from the passing of the several Acts for the purposes and services expressed in sch. B.

Sch. B. Part 7, Civil Services, class 3: "Schedules of sums granted to defray

It was further stated on affidavit that before the year 1836, under 7 Geo. 4, c. 64, the costs of criminal prosecutions were paid by the treasurer of the county, and charged upon the county. In 1836, in consequence of a resolution of the House of Commons that half of the costs of prosecution should be repaid to the counties out of the Consolidated Fund, half the costs in each year were repaid to the county by the Treasury.

In 1847, and in every subsequent year, the House of Commons, by resolution in committee of supply, have voted a certain sum to the Queen to defray the charge for prosecutions at assizes and quarter sessions, formerly paid out of county rates, and the Appropriation Act of each year had appropriated a certain sum for the purpose.

Jan. 27. *Jessel, S.G., Brown, Q.C., and Archibald*, shewed cause. Mandamus will not lie in this case. Where the legislature has constituted the Lords of the Treasury agents to do a particular act, in that case a mandamus might lie against them as mere individuals

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

the charges of the several civil services herein particularly mentioned, which will arise in course of payment during the year ending on the 31st of March, 1872, viz. . . . No. 2: For prosecutions at assizes and quarter sessions in England, formerly paid out of county rates, including adjudications under the Criminal Justice and the Juvenile Offenders Acts, sheriffs' expenses, salaries to clerks of assize and other officers, and for compensation to clerks of the peace under the Criminal Justice Acts, and other expenses of the same class, 201,173l."

By 29 & 30 Vict. c. 39, s. 14, when any sum or sums of money shall have been granted to Her Majesty by a resolution of the House of Commons or by an Act of Parliament, to defray expenses for any specified public services, it shall be lawful for Her Majesty from time to time, by her royal sign-manual,

countersigned by the Treasury, to authorize and require the Treasury to issue out of the credits to be granted to them on the exchequer accounts as hereinafter provided the sums which may be required from time to time to defray such expenses, not exceeding the amount of the sums so voted or granted.

By 7 Geo. 4, c. 64, ss. 22, 23, 24, 26, costs of criminal prosecutions in general were thrown on the county rates, and leave was given to justices of each county in quarter sessions, subject to approval of the judge of assize, to fix a scale of costs, the costs to be taxed by the clerk of the peace and clerk of assize respectively. This power was repealed by 14 & 15 Vict. c. 55, s. 4 and by ss. 5 & 6 the power of fixing the scale was transferred to the Secretary of State, the costs still being taxed by the proper officers as before.

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

designated to do that act; but in the present case, the money is in the hands of the Crown or of the Lords of the Treasury as ministers of the Crown; in no case can the Crown be sued even by writ of right. If the Court granted a mandamus they would be interfering with the distribution of public money; for the applicants do not shew that the money is in the hands of the Lords of the Treasury to be dealt with in a particular manner. The money is first voted by resolution of the House of Commons; under the Appropriation Act, 1871 (34 & 35 Vict. c. 89), s. 3, all sums granted by that Act are appropriated for the purposes and services expressed in schedule B. The effect of the annual Appropriation Act is not to give any third person a right to the money; but it is to prevent the Crown from appropriating money given for one purpose to another. The money is not a charge on the Consolidated Fund, although it comes out of that fund; it is voted annually. The effect of the schedule to the Act is not that the sum named shall be appropriated to the purposes mentioned, but that the Treasury shall not apply a sum beyond that which is mentioned to those purposes; it is not an enabling but a restrictive Act; and the meaning of the word "appropriated" is appropriated as between the Crown and the House of Commons; there is no obligation on the Treasury to pay any sums; but they may pay them. These sums are given to the Crown, and there is no legal obligation on the Crown which this Court can enforce. Further, it is discretionary with the Treasury what amount shall be expended. This shews that the duty imposed by the Act is a constitutional duty, and not a mere ministerial duty. The cases in which a mandamus has been granted against the Lords of the Treasury are distinguishable. In *Rex v. Lords of the Treasury* (1), the Court proceeded on the ground that the Lords of the Treasury had money in their hands, and that they had appropriated it to a particular purpose. The Act (4 & 5 Wm. 4, c. 15, s. 13), on which the question arose, has been repealed by 29 & 30 Vict. c. 39, s. 46, and the language of the Act was very different from the present Act. That case is explained in *Re Hand* (2), where the Court refused to grant a mandamus. In *Re Baron de Bode* (3), Coleridge, J., decided that a mandamus would not lie to the Lords of the Treasury as mere public depositaries

(1) 4 A. & E. 286.

(2) 4 A. & E. 984.

(3) 6 Dowl. 776.

commanding the payment by them of a sum of money; and that learned judge being one of the judges who decided the previous case, explains the grounds of the decision, and cites several cases to shew that in general a mandamus will not be granted. Thus a mandamus has been refused on the ground that the applicant had no vested right to the money in the hands of the Treasury: *Ex parte Ricketts* (1); *Rex v. Lords of the Treasury*. (2) In *The Queen Dowager's Case* (3), the rule for a mandamus was granted with the consent of the Crown. All the cases are commented on in *Ex parte Napier*. (4) In *Ellis v. Grey* (5), *Oldham v. Lords of the Treasury* is cited (6), in which it was decided that the jurisdiction of the Court of Exchequer extends only to the receiving the moneys which come into the Treasury while they are in transitu; but after Parliament has disposed of them and they have reached their destination, the jurisdiction of the Barons ceases. That case has an indirect bearing on the question. [They also cited Lord Somers' argument in *The Bankers' Case* (7); the judgment of Dallas, C.J., in *Gidley v. Lord Palmerston* (8); *Reg. v. Commissioners of Woods and Forests* (9); and the following American authorities: *Brashear v. Mason* (10); *Decatur v. Paulding* (11).]

Jan. 29. *Manisty Q.C.*, and *Gorst*, in support of the rule. As no affidavits have been filed on shewing cause, it must be taken that the Lords of the Treasury have funds still in their hands applicable to these disputed items.

[COCKBURN, C.J. The rule is not resisted on the ground of want of funds; nor have we any doubt that the whole of the costs as taxed ought to be paid. The point we wish argued is whether we have any jurisdiction to interfere by mandamus.]

Rex v. Lords of the Treasury (2) is directly in point, that a mandamus will lie. It is said that s. 13 of 4 & 5 Wm. 4, c. 15, is repealed; but the Act which repealed it, 29 & 30 Vict. c. 39, has a similar section (s. 14). Sections 13 & 15 also shew how the

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

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| (1) 4 A. & E. 999. | (6) Not elsewhere reported. |
| (2) 4 A. & E. 286. | (7) 14 How. St. Tr. 67. |
| (3) 16 Q. B. 357; 20 L. J. (Q. B.) 305. | (8) 3 B. & B. 275, at p. 235. |
| (4) 18 Q. B. at p. 701; 21 L. J. (Q. B.) 332. | (9) 15 Q. B. 761; 19 L. J. (Q. B.) 497. |
| (5) 6 Sim. at p. 220. | (10) 6 Howard, 92. |
| | (11) 14 Peters, 497. |

1872
THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

money gets into the hands of the Treasury; and when they have it appropriated to a specific purpose, they are bound to apply it to that purpose; and this duty will be enforced by mandamus. In *The Queen Dowager's Case* (1), Lord Campbell, C.J., expressed a clear opinion that a mandamus would lie, saying he would not grant the writ unless he thought so.

[BLACKBURN, J. Yes; under the repealed statute.]

The existing statute (29 & 30 Vict. c. 15, ss. 13-15) contains similar enactments, imposing the duty on the Treasury to pay the different sums to the persons and for the objects to which they are appropriated by the Annual Appropriation Acts. The Court being of opinion that the Appropriation Act leaves no discretion in the Lords of the Treasury, but that the whole taxed costs, on the production of proper vouchers, ought to be repaid to the county, it follows that a mandamus will lie commanding the Lords of the Treasury to take the proper steps to pay the balance by issuing the necessary minute: inasmuch as they admit, by filing no affidavits in reply, that all the preliminaries have been complied with, and that they hold the money applicable to the purpose.

COCKBURN, C.J. This is a case in which, if we had jurisdiction to issue a writ of mandamus, I should have no hesitation in granting it. Nothing can be more anomalous or unsatisfactory than the present system with regard to the taxation of these bills of costs. Everyone will agree that the expenses consequent upon prosecuting offenders ought to be defrayed out of the public purse. It is essential to the effective administration of criminal justice that the expenses of prosecutions should not fall upon those who come forward to complain of injuries which they as individuals have received, and which are injuries affecting the public as well as the private individuals who suffer; because experience tells us that persons are reluctant to prosecute and to bring offenders to justice if the expenses of such prosecution are to fall upon them. The old system was that the costs of prosecutions should be defrayed out of the rates of counties or other districts having criminal jurisdiction, the costs in such cases being taxed by proper officers appointed for the purpose. Many years ago, as far back as

1836, that system was to a certain extent altered, and the costs of prosecutions, heretofore cast upon the public funds of counties, were in part transferred to the public funds of the country ; and by a still later arrangement the whole of such costs of prosecutions were thrown upon the public revenue. The system of taxation, however, which had been found up to that time to work satisfactorily, was still continued. The same officers, who had taxed at the assizes or quarter sessions respectively, continued to tax as before. The whole expense had to be defrayed, in the first instance, out of the county or borough rates ; but by the altered system the amount so paid was to be refunded to the treasurers of the county or borough fund.

Now, the Lords Commissioners of the Treasury have thought proper to introduce this addition, or, as it appears to me, excrescence upon that previously existing system ; they have taken upon themselves, it is now said, for a period of fourteen years, to review the taxation of the proper taxing officers. I am very far from saying that the taxation of the costs of prosecutions ought not to be rigorously looked after and investigated, because it would be a monstrous abuse if prosecutors were allowed, by the laxity of the taxing officers, to extort from the public purse moneys which they have not properly or legitimately expended. But it is a very different thing to say,—instead of taxing on the spot where all the circumstances attending the prosecutions are known, where the Court, who may be the judge of assize, or the court of quarter sessions, can be appealed to in case of dispute,—that after the matter has been properly investigated by the officer whose lawful charge and duty it is to investigate such matters and tax such costs, two gentlemen sitting in London, by the sole authority of the Lords of the Treasury, shall review that taxation and strike off whatever they may, in the exercise of their discretion, think fit to disallow. I am utterly at a loss to conceive by what supposed authority it is that these officers are required and empowered to tax again and disallow items in the bills already taxed by the proper officers. The monstrous inconvenience of such a course is, I think, palpable. These gentlemen cannot have the same means of forming a proper judgment as those who tax upon the spot, and who have an opportunity of making themselves acquainted, and

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

are acquainted, with all the circumstances connected with each individual prosecution.

It is another thing, however, whether we have jurisdiction to interfere in such a matter. And it does not follow that because there is no remedy for the county or borough who have paid all the costs as originally taxed, except that of applying by petition to the Crown, or by petition to Parliament, it is not because there is no other remedy but that which may be a fruitless and abortive one, that this Court has jurisdiction to issue a writ of mandamus. I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction.

Therefore, the question comes to be, whether the Lords Commissioners of the Treasury, when this money gets into their hands, are bound to apply it as the servants of the Crown, or as the servants of parliament who vote the money. Independently of authority, I think there is no doubt whatever that we must look upon them as servants of the Crown. The money is voted by parliament as a supply to the Crown; ways and means are found with a view of furnishing the necessary funds for making that supply effectual. It is true that the money is appropriated to a specific purpose, and it is true that the money can only be appropriated to the purpose so specified in the Appropriation Acts. It is also true, as pointed out by Mr. Gorst, that the particular mode of obtaining the money is also prescribed by statute. It is not a supply to be at once handed over to the Crown, but it is a supply to be got at by a certain specified process, and it is true that the Crown must issue warrants or orders under the sign manual to enable the Lords Commissioners of the Treasury to have this money paid to them. But, nevertheless, when the money is paid, I can entertain no doubt that it is paid to the Lords of the Treasury, as servants of the Crown; and though I quite agree

that according to the Appropriation Act they were bound to apply the money upon the vouchers being produced, and had no authority to retax these bills, still I cannot say that there is any duty, which makes it incumbent upon them to do what I cannot hesitate to say they ought to have done, except as servants of the Crown: because in that character they have received this money, and in no other. Although the Lords of the Treasury have made a very great mistake, and although the present state of things is of the most anomalous and most unsatisfactory character, I regret to say, according to the true principle upon which this prerogative jurisdiction ever has been and ought to be exercised, I do not see that this Court has authority to issue this writ of mandamus. We have been pressed with the authority of the case of *Rex v. Lords of the Treasury* (1); but I think that is a case of very doubtful authority. It rests, after all, as is to be found in a subsequent dictum in this court, upon a particular clause in the then existing statute, 4 & 5 Wm. 4, c. 15, s. 13, and I doubt very much whether the section of that statute upon which the decision is supposed to rest would really support it; but be that as it may, that statute has been repealed.

Then with regard to the statute (29 & 30 Vict. c. 39, s. 14), to which Mr. Gorst ingeniously called our attention with a view of fortifying the case for the applicants, I cannot see anything in that statute which imposes a duty at law upon the Lords Commissioners of the Treasury. It may be a duty that they owe to the Crown, or it may be a duty that they owe to parliament to apply this money in discharge of the amounts which the counties are compelled without any choice on their part to pay; but it is a duty to the Queen or a duty to parliament, and it is not a duty at law which by any legal proceeding or by the exercise of the prerogative jurisdiction of this Court we can enforce.

Therefore, although I have the deepest regret in coming to the conclusion I do, I think we must discharge the rule.

I may add, if the Treasury are dissatisfied with the taxation which takes place immediately after the trial of the prosecutions, they should do as they have done before, send down an officer to represent them, or take steps for having more efficient

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

1872 officers if they are dissatisfied with the efficiency of the present officers.

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

The opinion we entertain is, that this system of reviewing the taxation of the properly appointed officers whose legitimate business it is to tax, and upon which taxation the counties are compelled to pay, is, to say the least, a very anomalous proceeding.

BLACKBURN, J. I have come to the same conclusion. I think if we had power to issue a mandamus to compel the payment of this money, it would be right to order the Lords Commissioners of the Treasury to pay it; but in my opinion we have no such power, though I think the Treasury have acted completely under a mistake. I must observe in saying this, that there is not the slightest intention on my part to question the exclusive prerogative of the House of Commons in voting money. As long as the thing remains in fieri a resolution in the House could not, I believe, be brought properly before this Court. But when the money has been voted, and the money has been granted, and an Appropriation Act has been passed, then it has become an Act of the legislature, and we must construe it when it comes before us as we should do any other Act. The Appropriation Act of each year regulates, so far as it goes, what is to be done with the money; and we find it appropriates the moneys already voted which have been granted to the Queen. And amongst other things it appropriates a portion of it to the payment of the cost of "prosecutions, hitherto paid out of county rates." The first question is, what does that mean? Though I listened very attentively to all that the Solicitor General said upon that part of the case, I could find nothing whatever to shake my opinion which I very early entertained, and still entertain. Formerly the costs of prosecutions, having been duly taxed, were payable out of the county rates, and when once they were duly taxed by the proper officers, county rates must pay them. That system of taxation may have been too liberal or too stringent. Upon that I say nothing, but the mode in which the costs were to be taxed was fixed by law; and when they have been duly taxed and allowed, the county rates must pay. Now I cannot read the Appropriation Clause in any other sense than that it directed the sum

mentioned to be appropriated for the purpose of relieving the counties from the whole of those costs of prosecutions, which heretofore had been paid out of the county rates, which they are still bound to pay, but which formerly they had been bound to pay without being entitled to be recouped. I cannot doubt at all that the Appropriation Act does not simply mean "this sum of money shall not be applied to any other purpose," but that it also means "this sum shall be applied to that purpose," and consequently I cannot doubt that the effect of the Appropriation Act was to grant a sum of money to Her Majesty, which sum is to be applied to the payment of those costs which heretofore the counties have been obliged to pay, and from which the country at large has taken upon itself to relieve the county rates. What seems to have been done in fact is this: though the particular bill of costs is duly incurred according to the existing law, though those costs have been duly ordered by the existing law to be paid, although the proper taxing officers have duly taxed those costs, and consequently the county is bound to pay them and cannot help themselves, the Treasury seem to have assumed that they may appoint examiners, and on the report of those examiners they may do what amounts to this, as it seems to me, advise Her Majesty not to appropriate the money to the specific purpose for which the House of Commons has voted that particular sum; that is to say, on the report of the examiners they advise Her Majesty not to repay the full amount, but to keep back some portion of it. This seems to me to amount to advice given to the Queen, when she has received money which by Act of Parliament has been appropriated for a particular purpose, to disregard that Act of Parliament and not to appropriate the money in the way in which according to the statute they are bound to do, and it seems to me to have been very bad advice.

Passing from that, the question remains whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by mandamus, namely, to issue a minute to pay that money: because it seems to me clear that we ought to grant a mandamus if there is such a statutory obligation, particularly where the application is made on behalf of persons who have a direct interest in the matter, viz., the treasurer of the county on behalf of the county which ought by

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

1872
THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

the statute to have been indemnified for the costs which they have been obliged to pay. But it is here, I think, that the case fails. The general principle, not merely applicable to mandamus but running through all the law, is, that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting as servant. To take a familiar instance, if a mandamus were applied for against the secretary of a railway company to do something, it would not be granted, merely because the railway company his masters had an obligation to perform the duty, and it makes no difference that the master, or the principal, or the sovereign is only suable by petition of right, or perhaps not at all. There is the familiar case of the surveyor of highways who is the servant of the inhabitants of the parish; the inhabitants of the parish cannot be sued, because they are not a body corporate, but the surveyor of the highways is not to be responsible for the non-performance of their duties, or the negligence of their servants, though he is the person who acts for them. The same principle applies to mandamus, if the duty is by statute, though perhaps "duty" is hardly the word to employ with regard to Her Majesty; where the intention of the legislature shews that Her Majesty should be advised to do a thing, and where the obligation, if I may use the word, is cast upon the servants of Her Majesty so to advise, we cannot enforce that obligation against the servants by mandamus merely because the sovereign happens to be the principal.

There are many cases applicable to this, beginning with the Post Office cases in Lord Holt's time, where Lord Holt differed from the rest of the Court, and it was held that the Postmaster General was not suable as a carrier for non-delivery of letters, because it was in effect the Crown; the Crown could not be sued in such a matter (1); and similarly where through the clumsiness of a man steering a ship of war, they negligently ran down a merchantman, it was held the owners could not sue the Queen, nor the captain of the man-of-war.

That being so, the question comes to be this, whether it can be shewn (common law out of the question) that in any way a duty is cast upon the Lords of the Treasury towards third persons,

(1) *Quære, Lane v. Cotton*, 1 Salk. 17; *Cas. temp. Holt*, 582. 2.

not merely a duty to the Queen to advise, but a duty to third persons to issue this minute which it is the object of the mandamus to make them issue. I certainly cannot find any such duty from the case referred to of *Rex v. The Lords of the Treasury*. (1) It is true the Court granted the rule in that case, but it was expected to be more fully argued upon the return, and taken to error. But it appears from what Lord Campbell said, who was then Attorney General, he advised the officers of the Crown to pay the money, but to take care that the effect of the Act was altered next year; and in the case of the *Queen Dowager* (2), Lord Campbell said that s. 13 of 4 & 5 Wm. 4, c. 15, cast a specific duty upon the Lords of the Treasury to grant a warrant, or to execute a warrant whenever there was a sum filed as a charge upon the consolidated fund. That was Lord Campbell's view of that statute, and upon that view of the statute it was said they had jurisdiction in the *Queen Dowager's Case*. (2) It was not much argued, nor is it necessary to inquire whether that was mistaken or not, but it does seem doubtful, when one comes to look at the words, whether they were not misunderstood; however, that statute is repealed, and the section which was supposed to cast the duty upon the Lords of the Treasury no longer exists. Upon that Mr. Gorst argued with great ingenuity, that the effect of the Act (29 & 30 Vict. c. 39) was in fact to cast a duty upon the Lords of the Treasury; but I am unable to see that the sections amount to anything more than this, that Her Majesty, to whom the money was granted in law, is to administer it according to the advice of her responsible advisers, and she must do it through the hands of her servants. I have found nothing, looking at the sections adverted to, to make the Lords of the Treasury (who have the money in their hands brought from the Bank of England until it is paid to the recipients) in any way more amenable to third persons than in the case I put during the argument of a private person's servant who has got money to pay weekly bills or other matters, or power to draw upon a bank for that purpose, in which case the servant could not be considered liable to third persons.

It seems to me that the obligation, such as it is, is upon Her Majesty, to be discharged through her servants, and you cannot

(1) 4 A. & E. 286.

(2) 16 Q. B. 357.

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

1872
THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

proceed therefore against the servants. For that reason only, which, however, I think is quite sufficient, I think there should not be a rule for a mandamus.

MELLOR, J. I am of the same opinion. I think the changes, to which our attention has been called, in the various Acts of Parliament relating to these matters, do not shew any change in the relation of the Ministers of the Crown towards the Crown. But all that the different Acts have done is to alter the machinery by which the grant, when made to the Crown, is to be distributed in the public service; and therefore I am clearly of opinion that we cannot issue this mandamus commanding the servants of the Crown, who hold the money, and whose duty it is to distribute it pursuant to the obligations which they owe to the Crown, to pay this money, or to take the steps which this rule calls upon them to perform.

I think that is a very clear principle, and I do not entertain any doubt that in this case we are rightly applying the doctrine; but I wish to say upon the question as to whether this money really belongs to the county funds, I entertain no doubt whatever, particularly when one looks at the history of the mode in which the costs were originally thrown on the county rates, and the long time they have incurred that burthen. I well recollect when the first remission was introduced by Sir Robert Peel in parliament, it was proposed and was understood, and was undoubtedly accepted as a remission to be set off against certain burthens which it was said the landed interest were unduly made to bear.

The process by which the costs appear to have been taxed was this: first of all, the scale was settled by justices with the consent of the judge of assize. That either was not found to operate well; probably, it was found that extravagance might be introduced; however, parliament, for the purpose of remedying that, gave to the secretary of state a power to settle the scale of costs which should in future be allowed, and that was the protection which parliament chose to claim, and very rightly chose to claim, over the costs of prosecutions. Persons were sent round to see to the taxation of these bills in the interest of the public against any supposed ignorance or extravagance. I thought that was a very

legitimate object, and I should be glad if the Treasury were to obtain an Act of Parliament which enabled them to be present, and to assist in the taxation of these bills at the time; because I think it would very possibly, and indeed probably be a very wise and prudent provision; but that is not what the law has provided. Now, the judge, or chairman of quarter sessions, orders the costs to be paid; they are taxed, and an order is directed to the treasurer of the county to pay the amount as taxed. Nothing can be more conclusive and nothing can be more clear, than that is an obligation on the county which they were unable to resist, and in some of the cases it is expressly said that particular certificates from the magistrates shall be conclusive. Whether that is so or not, it appears to me conclusive, that there is no power by law to review the taxation when it is once made. The Treasury may very well require the production of vouchers. I think that is quite a legitimate course for the Treasury to take; but I think that was the extent of their authority, and as to reducing the amount allowed on taxation, there is no power on their part to do so, and so far as they have done it, as it appears to me, they have disregarded the operation of the Appropriation Act. The clause provides for expenses of prosecutions at assizes; it is not as the Solicitor General suggested, that they "may" pay, it is that they are to pay a sum not exceeding the given sum.

The object of the grant is to defray the charges, and it is idle to say, when you have got this money granted by parliament, and appropriated by parliament for the purpose of defraying these expenses, that the Treasury shall be at liberty to say, "We will pay nothing, or only so much as we think is just." That is not the construction of the Act of Parliament; it is that the Treasury are to pay out of the funds which are appropriated, so far as they will extend, the costs already paid by the counties.

I agree entirely with the observations of my Lord and my Brother Blackburn, that the Treasury have acted, no doubt, under some misapprehension or mistake as to their authority. They have not only required vouchers, but have altered the quantum which has been conclusively allowed by the mode prescribed by law.

Therefore, under these circumstances, although I am clearly of

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY.

1872
 THE QUEEN
 v.
 LORDS COM-
 MISSIONERS
 OF THE
 TREASURY.

opinion that the rule cannot be made absolute, still at the same time I am bound to say I think that the Treasury have misunderstood the duty which has devolved upon them with reference to these costs of prosecutions.

LUSH, J. I also am of opinion that this rule must be discharged. I think that the applicants have failed to make out that which is essential to entitle them to a writ of mandamus, namely, that there is a legal duty imposed upon the Lords of the Treasury—a duty as between them and the applicants—to pay over this sum of money. The only statute which can be brought to aid at all is the Appropriation Act, and that, as it seems to me, clearly shews that the money is voted to the Crown upon trust that the Crown will disburse it for certain specified purposes. When the money gets to the hands of the Lords Commissioners of the Treasury, who are responsible for dispensing it, it is in their hands as servants or agents of the Crown, and they are accountable theoretically to the Crown, but practically to the House of Commons, and in no sense are they accountable to this or any other court of justice. There is not a word, to my mind, in this Act or any other Act shewing an intention on the part of the legislature to impose any such obligation on the officers of the Crown, so as to subject them to the jurisdiction of this Court in reference to the disbursement of moneys voted by the Crown for specific purposes.

Upon the second point I am also of opinion that the practice resorted to by the Treasury of re-taxing and reducing costs, paid by the county pursuant to the direction of the judges at the time, is a practice in violation of the terms of the Appropriation Act. If this question had arisen some years ago, I might have been unable to collect from the very general language of the then Appropriation Acts what the intention was; but from the year 1855 downwards the language has been altered, and, I cannot help supposing, intentionally altered.

Before we turn to that clause, it is needful to bear in mind that by several Acts of Parliament costs are allowed or allowable in most prosecutions, though not in all of them, and they are to be paid in the first instance by the treasurer of the county. An order is supposed to be made in each case upon the treasurer of the

county, who is bound to pay in the first instance the person to whom those costs are due.

Reading, in reference to that state of things, the language of the Appropriation Acts from the year 1855 down to the present time (and they are all nearly in the same language), I think one cannot be at a loss to ascertain what is the meaning of the legislature. The words are, "for prosecutions at assizes and quarter sessions, formerly paid out of county rates, including adjudications under the Criminal Justice Act, sheriffs' expenses," and so on, such a sum of money. Up to a given period the costs were not only paid out of the county rate, but were a charge and burden upon the county rate, and the county had no claim anywhere else. For several years the counties have had a claim by virtue of the statutes more or less upon the Treasury.

Now the words "formerly paid out of county rates" to my mind clearly imply that that which was before a charge and burden upon the counties shall be so no longer; and the Crown or the Imperial Treasury shall pay, and parliament provides the money for paying the costs of prosecutions at assizes and quarter sessions, sums which were formerly paid out of the county rates; and I think the words, read with reference to the present condition of things, do clearly imply that that which the counties have to pay in the first instance is intended to be reimbursed out of the sums voted by parliament. Therefore, I think that the practice which seems to have prevailed for fourteen years is entirely unwarranted.

Rule discharged.

Attorneys for applicants: *Ridsdale, Craddock, & Ridsdale, for Birchall, Wilson, & Hulton, Preston.*

Attorneys for defendants: *Solicitors to the Treasury.*

1872

THE QUEEN
v.
LORDS COM-
MISSIONERS
OF THE
TREASURY

1872

Jan. 26.

GEIPEL AND OTHERS v. SMITH AND ANOTHER.

*Contract, Justification of Refusal to Perform—Charterparty—Blockade—
Restraint of Princes.*

4CP. 188
42.25
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-592
-657-9
667-5
9CP 519.
10CP 1329
1401-7
44BD 663
604K ca
85, 61
7 app ca 677

Declaration: That by a charterparty it was agreed that defendants' vessel should, with all convenient speed, sail to a spout as directed by plaintiffs, and there load a full cargo of coals; and then, as soon as wind and weather should permit, should proceed to Hamburg, and there deliver the same, the restraint of princes and rulers (inter alia) excepted. That plaintiffs did, and were ready to do, all that was necessary on their parts; but defendants, before any breach by plaintiffs of the charterparty, refused to carry out the charterparty, and to let their ship take or carry any goods of plaintiffs to the port of Hamburg, and gave notice to plaintiffs that they renounced the charterparty.

Pleas: 5. That before any breach of the charterparty, war broke out between France and Germany, wherein the port of Hamburg was situate; that the said port was blockaded by the French fleet; that the Queen, by proclamation, enjoined her subjects to a strict neutrality, and not to commit any violation of the law of nations; that the defendants were British subjects, and their ship was a British ship, and the cargo being a cargo to be carried to Hamburg, the further performance of the charterparty became illegal, and the defendants, as they lawfully might, refused to carry out the same. 6. Repeating the above allegations, that defendants having notice of the premises, refused to allow the ship to receive a cargo for the purpose of running the blockade and delivering the cargo, which was the breach complained of. 7. Repeating the same allegations, that defendants were ready to perform the charterparty so far as they were not prevented by any of the excepted causes; but that the charterparty could not have been carried out within a reasonable time, except by running the blockade, wherefore defendants refused to carry out the charterparty. On demurrer:—

Held, that the pleas disclosed substantially a good defence; for that the charterparty being for one single adventure to commence at once, and the contract being still executory, the defendants were justified in throwing up the contract and refusing to load the ship, when the further performance of the contract within a reasonable time was prevented by an excepted cause, viz., the blockade, which was a "restraint of princes."

DECLARATION: That by a charterparty entered into between the plaintiffs and the defendants, it was, amongst other things, agreed that the defendants' vessel, the *Martindale*, being tight, stanch, and strong, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to a spout, as directed by the plaintiffs or their agent, and there take on board a full and complete cargo of coals; and being so loaded, the captain should immediately call at the office of the plaintiffs or their agents, and clear with them at the custom house, also sign bills of lading with-

out qualification, as they present them, but without prejudice to the said charterparty; and then, as soon as wind and weather should permit, should proceed to Hamburg, and there deliver the same to the said freighters or assigns, they paying the freight for the same at a certain agreed rate; the act of God, Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind, during the said voyage always excepted. That the plaintiffs did, and were ready and willing to do, all things, and all conditions precedent were fulfilled, and all times elapsed necessary to entitle, and nothing happened to disentitle, the plaintiffs to have the defendants observe and fulfil the terms of the said charterparty, and to maintain this action for the breach thereof hereinafter mentioned; yet the defendants, before any breach by the plaintiffs of the said charterparty, and although not prevented by any of the said excepted perils, causes, matters, or things, absolutely refused to observe and fulfil the terms of the said charterparty, and to let their said ship take or carry any goods of the plaintiffs' to the said port of Hamburg, and gave notice to the plaintiffs that they absolutely refused so to do, and that they would not observe or fulfil, and absolutely renounced the said charterparty, and wrongfully and in violation of the said charterparty discharged the plaintiffs from directing the said ship to sail or proceed to any spout, and from otherwise observing and fulfilling the terms of the said charterparty, and renounced the said charterparty, and thereby wrongfully broke and violated the said charterparty.

Fifth plea, that, after the making of the charterparty, and before any breach thereof, a war was being carried on between the peoples of Germany, wherein the said port of Hamburg was situate, and the peoples of France, and the said port of Hamburg was then blockaded by the fleets of France; and the Queen, by royal proclamation, enjoined all her subjects to maintain a strict neutrality between the said belligerent peoples, and not to commit any act contrary to, or in violation of, the law of nations. That the defendants were and are British subjects, and that the ship was a British ship, and the cargo was a cargo to be carried to and delivered at the said port of Hamburg; wherefore the further performance of the said charterparty became and was illegal, and the

1872

GEIPEL
v.
SMITH.

1872

GEIPEL
v.
SMITH.

defendants, as they lawfully might, refused further to carry out the same.

Sixth plea: That after the charterparty was entered into, and before any breach thereof by the defendants, a state of war arose and existed, as in the last plea mentioned, and the port of Hamburg became and was blockaded by the French; and the Queen published a proclamation as aforesaid, and thereupon the defendants, having notice of the blockade and of the proclamation of Her Majesty, refused to allow the ship to receive a cargo for the purpose of carrying the same to the blockaded port whilst the same was so blockaded, and of running the blockade with the cargo for the purpose of delivering the same at the port during the continuance of the blockade, which is the breach complained of.

Seventh plea: That after the charterparty was made, and before any breach by the defendants, a state of war existed, and the port of Hamburg was blockaded, and the Queen published her proclamation, as in the fifth plea stated; and the defendants were ready and willing to perform the charterparty on their part, so far as they lawfully might, and so far as they were not hindered and prevented by any of the said excepted causes; that the ship could not have received a cargo, nor could the charterparty have been carried out and fulfilled within a reasonable time in that behalf, except by the ship receiving a cargo for the purpose of carrying the same to the said blockaded port, and of running the blockade with the cargo, and of delivering the same at the port whilst so blockaded, wherefore the defendants refused to carry out the charterparty.

Demurrer to the pleas, and joinder.

Cohen, for the plaintiffs. The fifth plea is clearly bad; there is nothing illegal—that is, contrary to the municipal law—in a contract between neutrals, even for the express purpose of running a blockade: *The Helen*. (1)

[COCKBURN, C.J. In that case the wages had been earned.

BLACKBURN, J. There the parties contracted with their eyes open to the danger; here the danger arises subsequently to the contract.]

(1) Law Rep. 1 A. & E. 1. 11 Jan MS. 1025

Yes, but the only circumstance on which the defendants justify their refusal to carry out the contract is the risk of being captured ; but if parties do not choose to except this risk from their contract, they are bound to perform it: *Hadley v. Clarke*. (1) It was there held that even an embargo only suspended, and did not dissolve, the contract, and that the parties were bound to carry it out after two years' delay.

[COCKBURN, C.J. An embargo was not excepted in that case, and, moreover, the adventure had begun before the embargo was put on. Here the restraint of princes is excepted, and the blockade commenced before the vessel had started.]

Apprehension of restraint is not restraint ; mere apprehension of an embargo, although well founded, is no justification for non-fulfilment of a contract: *Atkinson v. Ritchie*. (2)

[LUSH, J. There is here more than apprehension ; there is an actual blockade.]

No doubt ; but non constat that it would last more than a reasonable time. The defendants, therefore, had no right, without the plaintiffs' assent, to treat the contract as at end. In *Spence v. Chodwick* (3) the cases already cited were recognized, and it was held that inability, incapacity, or impossibility of performance is no excuse, according to the law of England, unless caused by something expressly excepted by the contract ; and the law is so laid down in *Leake on Contracts*, pp. 358-361.

[BLACKBURN, J. No doubt that is the English law ; *Hills v. Sughrue* (4) is to the same effect. But why is a blockade not a restraint of princes ? and if it is, then it is excepted in the charter-party.]

Even conceding that, it simply suspends the performance of the contract, or, at most, goes to shew the plaintiffs are entitled to nominal damages only ; but it cannot justify the defendants in at once throwing up the contract.

Watkin Williams (*R. B. Steele* with him), for the defendants. All the pleas raise a good defence. The contract is one entire contract to go and load and at once proceed with the coals to Hamburg as soon as wind and weather permit, and the defendants in

1872

GEIPEL
v.
SMITH.

(1) 8 T. R. 259.

(3) 10 Q. B. 517 ; 16 L. J. (Q.B.) 313.

(2) 10 East, 530.

(4) 15 M. & W. 253.

1872
GEIPEL
v.
SMITH.

effect say "Hamburg was blockaded before the ship started; it became practically impossible for us to proceed to the execution of this contract by carrying the coals to the blockaded port, and, therefore, we at once renounced the contract." It is in effect the converse of *Hochster v. De la Tour* (1), and the principle of that case applies. It was of no use to go to the spout when it was useless to load. This principle is recognized in *Avery v. Bowden*. (2) It is not contended that the blockade put an end to the contract ipso facto, though it has been stated to have been so decided in America: Abbott on Shipping, p. 458, 11th ed. (3), citing *Scott v. Libby* (4); and the marginal note of that case is to that effect; but all that was decided was, that a blockade of the port of discharge having prevented the shipowners from delivering the cargo, they could not sue for freight, not having earned it. In the present case, however, the blockade must be taken to have been effectual, and that at once prevented the voyage from being attempted: Abbott on Shipping, p. 461, 11th ed., citing *The Elizabeth*. (5) In *Medeiros v. Hill* (6) the parties knew of the blockade before they entered into the contract, which at once distinguishes it from this case; and all that *Naylor v. Taylor* (7) decides is, that a contract to run a blockade is not illegal. But all that the defendants now contend is, that it excuses the performance of the contract. It is clear law that a ship is not bound to attempt to enter a port when there is an effective blockade: see Parson's Law of Shipping, p. 332. *Pole v. Cetcovich* (8) is to the same effect—that the captain is not bound to run certain risk of capture. *Hadley v. Clarke* (9) and *Hills v. Sughrue* (10) have already been distinguished by the Court. There are cases from *Paradine v. Jane* (11) and *Williams v. Lloyd* (12) to shew that, by the English law, if a man contracts without qualification, he is bound by his contract,

(1) 2 E. & B. 678; 22 L. J. (Q. B.) 455. *17 June 1872.*

(2) 2 E. & B. 714; 25 L. J. (Q. B.) 49; 6 E. & B. 953; 26 L. J. (Q. B.) 3.

(3) The passage is not Lord Tenterden's, as it does not occur so early as in the 5th ed.

(4) 2 Johns. 336.

(5) 1 Edw. 198.

(6) 8 Bing. 231.

(7) 9 B. & C. 718.

(8) 9 C. B. (N.S.) 430; 30 L. J. (C.P.) 102. *7 June 185. 604*

(9) 8 T. R. 259.

(10) 15 M. & W. 253.

(11) Aleyn, 26.

(12) Sir W. Jones, 179.

(2) SC 1 June 185. 1167; 2 June 185. 239

although it becomes impossible of performance. Though the law is different in the Continental codes: see Pothier, *Louages Maritimes*, *Chartepartie*, § 98; and some qualification must be put on the generality of the proposition, even in the law of England, as in *Bailey v. De Crespigny* (1), where the defendant was held excused from the performance of his covenant, a subsequent Act of Parliament having put it out of his power to perform it; and the maxim, “*Lex non cogit ad impossibilia*” was acted upon. In the present case the defendants’ defence may be put shortly thus: When a contract is one entire contract, whatever excuses a person from the performance of the whole excuses him from performing any part. Therefore, as it was impossible to perform the contract by carrying the coals to Hamburg, the defendants were excused from performing the worse than useless initial step of sailing to Newcastle and loading the coals there.

Cohen, in reply. Even conceding that a blockade is within the exception of “restraint of princes,” that only excuses delay in the performance of the contract. The defendants, therefore, ought to have loaded the coals, and then have sailed to Hamburg as soon as wind and weather permitted after the blockade had ceased. [He also cited *MacAndrew v. Chappell*. (2)]

COCKBURN, C.J. I am of opinion that our judgment must be for the defendants. I will not say that all and each of the pleas are good, but on the admitted facts sufficient is shewn to constitute a defence to the action. The declaration is upon a charterparty, whereby the defendants, the shipowners, engage to load a cargo of coals at a spout, as directed by the plaintiffs, and having loaded to proceed, as soon as wind and weather would permit, to Hamburg, and there deliver the coals. To that contract, however, there are qualifications, and on one of these the defendants rely—“the restraints of princes and rulers excepted.” The pleas shew that, after the making of the charterparty, and before anything had been done by either party in furtherance of the contract, war broke out between France and Germany, and the French government proceeded to declare, among other ports, that of Hamburg to be blockaded, and it must be taken that an effective blockade

1872

 GEIPEL
v.
SMITH.

(1) Law Rep. 4 Q. B. at p. 180, 185.

(2) Law Rep. 1 C. P. 643.

1872

GEIPEL
v.
SMITH.

was established and maintained. The question is, whether this was such a state of things as justified the defendants in throwing up the charterparty, and refusing to perform either part of it, first in going to a spout to load, and then in taking the cargo to Hamburg. It is perfectly true that they might have gone to the spout and loaded the cargo; there was no obstacle to their doing that: but they say there was an obstacle to their carrying the cargo to Hamburg, viz., the effective blockade of that port; and that as, in consequence of it, they could not carry out their contract, they were excused from taking the initial step; and I think that the terms of the contract justified this course. I do not think it necessary to consider the larger proposition put forward by Mr. Williams, based on Continental codes—that in the absence of a stipulation as to unforeseen circumstances, we should imply such a term—because I base my judgment on an exception which is contained in terms in the charterparty, viz., of restraints of princes, &c. Does that afford the defendants a justification? I think it does.

800665 First, is a blockade a restraint of princes? I think it is. It is an act of a sovereign state or prince; and it is a restraint, provided the blockade is effective: and in the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. In such a case the obstacle arises from an act of state of one of the belligerent sovereigns, and consequently constitutes a restraint of princes. The case, therefore, is brought within the exception in the charterparty. But then it is said that the exception must be taken to apply to the whole contract, and that, inasmuch as the defendants were bound to sail as soon as wind and weather would permit, that must mean, if there be no such restraint; and if there be, then as soon as wind and weather permit after the restraint is removed. But it would be monstrous to say that in such a case the parties must wait—for the obligation must be mutual—till the restraint be taken off—the shipper with cargo, which might be perishable, or its market value destroyed—the shipowner with his ship lying idle, possibly rotting—the result of which might be to make the contract ruinous. At all events it must be taken that the restraint must cease within a reasonable time, and that the duty of the defendants was to wait

only a reasonable time prepared to carry out their contract should the restraint be removed; but the defendants rest their defence on the ground that it was here impossible to expect, from the nature of the circumstances, that the obstacle of the blockade would be removed within a reasonable time. It is a sufficient answer on the defendants' part that it was not likely to be removed within a reasonable time; and assuming that either party was bound to wait a reasonable time to ascertain whether the obstacle would be removed, in point of fact it was not so removed, and the defendants were therefore justified in not attempting to perform their contract. But then it is contended by the plaintiffs that the contract is divisible into two parts, and that the defendants ought to have performed the first part, which was practicable, in order to be in a position to perform the second, which was not. But the answer of the defendants is that the contract is one entire contract, and that the impossibility of performing the whole within a reasonable time dispensed with the necessity of taking any steps towards its performance. And it is perfectly obvious that this is so: for what good would it have been to the shipper that the shipowner should go to the spout and take in the coals, if he could not proceed with the cargo to Hamburg? None whatever. It is an entire contract, and anything that applies to make the performance of one part impossible must be taken to apply to the whole; and it is admitted that the defendants could not have got to their port of destination. The true way of looking at this case, as it appears to me, is this: it was an entire contract, and there was an insuperable obstacle to the performance of it in toto; and the defendants were therefore justified in not performing that part of it which was possible, but which, without the possibility of performing the other part of it, was useless.

1872

GEIPEL
v.
SMITH.

BLACKBURN, J. I have come to the same conclusion, that our judgment must be substantially for the defendants; though I have some doubts whether the fifth plea can be sustained. The first thing one has to look to, is the form and nature of the contract declared upon. It is an executory contract, by which the defendants agree to send their ship with all convenient speed to a spout and there ship a cargo of coals, and proceed thence with it as

1872

GEIPEL
v.
SMITH.

800665 soon as wind and weather permit (which does not mean more than with reasonable despatch), and deliver it at Hamburg. To the obligation of a strict performance of this contract certain exceptions are made, one being the "restraint of princes." Whilst the contract was still executory, war broke out between France and Germany, and France proceeded to blockade the enemy's ports, and upon these pleas we must take it that there was an effective blockade of Hamburg. The defendants therefore, the shipowners, could not fulfil their contract by delivering the cargo, without running the blockade. I am unable to see why this was not a restraint of princes; it was clearly a restraint by the then Emperor of France preventing the cargo from being carried on to Hamburg. But then comes another question: conceding that whilst the blockade existed there was "a restraint," an obstacle to the fulfilment by the defendants of their obligation under the charterparty, it is said that the moment the blockade was raised the ship might have gone off, and therefore she ought to have been ready with her cargo on board to start at any moment. But I cannot agree that however long the blockade existed, which might be during all the time the war lasted, and therefore might have been for years, the ship and cargo must be kept ready to sail as soon as wind and weather permitted after the blockade was raised. It would be most inconvenient to give such a construction to the contract, and would be to frustrate the very object of such a contract, viz., the speedy transport of the shipper's goods, and the remunerative employment of the shipowner's vessel. I take the effect of such a state of things as an effective blockade of the port of discharge is not merely to excuse delay in the carrying out of the contract, but that, after a reasonable time, it relieves the parties, the contract being altogether executory, from the performance of it. The case of *Touteng v. Hubbard* (1), if I do not misunderstand it, went to this extent. There there was a charterparty of a Swedish ship to proceed to St. Michael's and there load a cargo of fruit, with the usual exception of restraint of princes. An English embargo was put on Swedish vessels, and the ship was prevented sailing during the fruit season. The shipowner offered to proceed on the voyage as soon as the embargo was taken off, but the charterer declined the offer;

(1) 3 B. & P. 291, at p. 298.

upon which the shipowner sued for loss of freight. The Court, however, held that he could not recover, saying, that the exception of restraint of princes was in favour of the shipowner, but that could not be carried to the extent of saying that the charterer is bound to carry out the contract by supplying a cargo after the fruit season is over; and this would seem to support the proposition that a shipowner is bound in such a case to delay his vessel, that is, keep it unemployed, only for a reasonable time. Here there was an executory contract, and the object both parties had in view depended very greatly on time. The goodsowner stipulates to get his coals delivered within a reasonable time, and it would be monstrous to say that, in the event of a blockade, he was bound to provide a cargo and keep it on board all the time, until, at the very least, all commercial profit would be at an end. On the other hand, it would be an equal hardship on the shipowner were he bound to keep his ship in the dock until it perhaps rotted. The object of each of them was the carrying out of a commercial speculation within a reasonable time; and if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say, "Our contract cannot be carried out;" and, therefore, the shipowner had a right to sail away, and the charterer to sell his cargo or refrain from procuring one, and treat the contract as at an end. This is how the sixth and seventh pleas treat the matter. The sixth plea says, "The plaintiffs asked us to run the blockade, that is, to fulfil the contract while the restraint of princes was existing, which we were expressly relieved from doing." The seventh plea says, "It was impossible for us to fulfil the contract within a reasonable time, without running the blockade;" and on the plea it must be taken that the blockade lasted beyond a reasonable time. Mr. Cohen says the plea only shews facts which go to reduce the damages to a nominal sum, but affords no answer to the declaration, which says that the defendants refused to sail at all; but this plea, it seems to me, does not only shew that the plaintiffs have suffered no damage, but affords a defence to the action, inasmuch as the contract was still executory, and the defendants say, "We are not going to let our ship sail to the port of loading at all, because you, the plaintiffs, never will be ready and

1872

 GEIPEL
v.
SMITH.

8652

1872

GEIPEL
v.
SMITH.

60 App Cas.
53.

willing to perform your part of the contract." But then it is said, it is possible the blockade might be raised within a reasonable time. No doubt it was possible. But it must be taken on this record that it was not raised within a reasonable time; so if the defendants chose to run the risk, and in the event turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away. Possibly, had they turned out wrong, the plaintiffs would have been entitled to say, "We were ready and willing to put a cargo on board, you chose to take your chance, and have turned out wrong, therefore we have a cause of action against you." But the defendants here were right, and there never was a time when the plaintiffs could say, "We are ready and willing and able to perform our contract." Very different considerations arise where the cargo is already on board, or, as in *Hadley v. Clarke* (1), already on the voyage before the obstacle intervenes. But whilst the contract still remains altogether executory, I think time is so far of the essence of the contract as that matter provided against which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform it.

LUSH, J. My Brother Mellor, who has just left the court, concurs in the judgment, and I have also nothing to add to the judgments already delivered.

Cohen asked for the direction of the Court as to how judgment was to be entered on each plea.

LUSH, J. The sixth and seventh pleas have been already pronounced to be good. I think the fifth plea may also be treated as valid. It alleges the breaking out of a war between France and Germany, and a blockade of the port of Hamburg. If the impediment had been in its nature temporary I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial

adventure like this. The plea, therefore, seems to me *primâ facie* good.

1872

GEIPEL
v.
SMITH.

COCKBURN, C.J., and BLACKBURN, J., expressed their assent.

PER CURIAM.

Judgment for the defendants on all the pleas. (1)

Attorney for plaintiffs: *John Scott*.

Attorneys for defendants: *Gold & Son*.

(1) See *The Teutonia*, Law Rep. 3 A. & E. 394.

END OF HILARY TERM, 1872.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

EASTER TERM, XXXV VICTORIA.

1872

April 24.

CULLEN, APPELLANT; TRIMBLE AND OTHERS, RESPONDENTS.

*Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70) ss. 57, 103, 108—
Jurisdiction impliedly given to Justices to convict summarily.*

By s. 57 of the Contagious Diseases (Animals) Act, 1870, if any person exposes, in a public place where animals are commonly exposed for sale, any animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shews, to the satisfaction of the justices before whom he is charged, that he did not know of the same being so affected; and by s. 103 a penalty not exceeding 20*l.* is imposed on any person guilty of an offence against the Act:—

Held, that jurisdiction was impliedly given to justices to summarily convict in a penalty a person guilty of an offence under s. 57.

CASE stated, under 12 & 13 Vict. c. 45, s. 11, on appeal to Quarter Sessions.

An information was laid against the appellant charging him with having exposed in a certain market, the same being a public place where animals are commonly exposed for sale, four bullocks affected with a certain contagious and infectious disease, to wit, &c., contrary to s. 57 of 32 & 33 Vict. c. 70.

On the hearing before two justices it was objected, on behalf

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of the appellant, that the justices had no jurisdiction, under the Act, to convict in summary manner for the offence charged.

The justices overruled the objection, and convicted the appellant of the offence, and adjudged him to pay 20*l.* penalty and costs, the conviction being drawn in the form (I. 1) given in the schedule to 11 & 12 Vict. c. 43.

The question for the Court was whether the justices had jurisdiction within the Act; if the Court was of opinion in the affirmative, the appeal was to be remitted to the sessions to be heard on the merits.

By s. 57 of the Contagious Diseases (Animals) Act, 1870 (32 & 33 Vict. c. 70, s. 6), "If any person exposes in a market or fair, or other public place where horses or animals are commonly exposed for sale, . . . any horse or animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shews, to the satisfaction of the justices before whom he is charged, that he did not know of the same being so affected, and that he could not with reasonable diligence have obtained such knowledge . . ." By s. 103, "If any person is guilty of any offence against this Act, . . . he shall be liable to a penalty not exceeding 20*l.*" By s. 108, If any party feels aggrieved by the dismissal of his complaint by justices, or by any determination or adjudication of justices with respect to any penalty under this Act, he may appeal therefrom, (1) to any quarter sessions for the county or place in which the cause of appeal has arisen. (2) The appellant shall, within three days of the said cause of appeal, give notice to the clerk of the petty sessional division for which the justices act whose decision is appealed from.

Aspinall, Q.C., for the appellant, contended that there must be clear words to give summary jurisdiction to justices; unless this jurisdiction was clearly given, the remedy for penalties was only by action.

Torr, Q.C., for the respondents, contended that there was ample in s. 57, coupled with ss. 103 and 108, to shew that it was the intention to give jurisdiction to justices.

THE COURT (Blackburn, Hannen, and Quain, JJ.) were of

1872
CULLEN
v.
TRIMBLE.

opinion, looking at the various sections of the statute, that jurisdiction was impliedly given to justices, under s. 57, to summarily convict in the penalty named in s. 103, though the Act was very negligently and slovenly drawn.

Judgment for the respondents.

Attorneys for appellant: *Gregory, Rowcliffes, & Co.*

Attorneys for respondents: *R. M. & F. Lowe.*

April 24.

COOK, APPELLANT; MONTAGU, RESPONDENT.

Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 21—Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), ss. 2, 12—"Owner"—"Occupier."

By s. 21 of the Sanitary Act, 1866, when a nuisance arises from the want or defective construction of structural works, before taking proceedings notice to do the necessary works is to be served on the "owner" of the premises on which the nuisance arises. "Owner" by s. 2 of the Nuisances Removal Act, 1855 (which is incorporated with the other Act) "includes any person receiving the rents of the property, in respect of which the word is used, from the occupier of such property, on his own account, or as trustee or agent for any other person."

A. was lessee for twenty-one years, at a rack rent, of a house and shop; he occupied the shop himself and underlet the upper part of the house to B. as a yearly tenant. The upper part was shut off from the shop, and A. had no access to it. There was a privy in the upper part of the house, which the nuisance authority took proceedings to abate, as a nuisance arising from a defective construction of a structural convenience; and they proceeded against C., who received the rent from A. as agent for A.'s landlord:—

Held, that C. was not "owner," as he did not receive the rent from B. who was the occupier of the premises on which the nuisance arose.

CASE stated by Justices of Bath, under 20 & 21 Vict. c. 43.

The following are the material parts of the case.

A complaint was laid by the respondent, inspector of nuisances, against the appellant, under the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), and the Sanitary Act, 1866 (29 & 30 Vict.) c. 90), charging that a nuisance, viz., a foul and offensive privy, existed on certain premises, of which it was alleged that the appellant was "owner," within the meaning of the Acts.

There was in the house and premises in question a foul and offensive privy, so constructed and in such a state as to be a

nuisance and injurious to health; and the justices found that certain alterations, amounting to turning the privy into a water-closet, were necessary.

By an indenture of the 8th of January, 1853, John Allen (since deceased) demised the said house and premises to Richard Hancock for twenty-one years, from Midsummer, 1853, at a rack rent of 60*l*.

On the 7th and 27th of February, 1871, the days respectively on which the premises were inspected and the information laid, Hancock continued to be, and still is, the lessee paying the rent to the appellant as agent of the representatives of Allen. At that time, and for four years then last past, Hancock occupied the entrance or shop floor only of the house and premises. Hancock, by a verbal agreement, had during that time underlet the residue of the house and premises, including the privy complained of, to Emily Kingston, as yearly tenant to him at a rack rent, which she paid to him; and she at the time in question occupied the premises so underlet to her. The privy complained of provided the only closet accommodation for Emily Kingston, her family, and inmates; and Hancock had no access to and did not use it.

The respondent, under the direction of the local board of health, the nuisance authority, had served the proper notices on the appellant as "owner" of the premises, to do the necessary works, but no steps had been taken by him to do them.

It was contended on the part of the appellant that the nuisance did not arise from the want or defective construction of any structural convenience; and that Mrs. Kingston, the occupier, was the person by whose default the nuisance arose, and she was the proper person to be proceeded against. If not, that the appellant was a mere ground landlord, and Hancock, as the lessee for twenty-one years, and the receiver of the rent from the occupier, was the "owner" within the Acts, and was the proper person to be summoned.

On the part of the respondent it was contended that the nuisance was caused by want of structural convenience; and that the appellant was "owner" within the meaning of the Acts.

The justices were of opinion that the appellant came within the interpretation clause (s. 2) of 18 & 19 Vict. c. 121, which enacts

1872
COOK
"MONTAGU.

1872

 COOK
 v.
 MONTAGU.

that "the word 'owner' includes any person receiving the rents of the property in respect of which that word is used from the occupier of such property on his own account or as trustee or agent for any other person or as receiver or sequestrator appointed by the Court of Chancery or under any order thereof, or who would receive the same if such property were let to a tenant." They considered that the works which they found to be needful to abate the nuisance, and to the want of which they found the nuisance to be due, were structural works within the meaning of the Acts, and that the nuisance complained of arose from the want or defective construction of a structural convenience. They were further of opinion that, under the circumstances, they were, by s. 21 of 29 & 30 Vict. c. 90 (1), compelled to hold that the local board of health could only look to the owner, and not to the occupier, and that they could not regard either the contents or conditions of Hancock's lease, and that the fact that the lessee, Hancock, did not actually occupy the part of the house to which the privy was attached was immaterial. And that as the appellant was the receiver from Hancock of the rents of the premises, he was properly before them as owner within the meaning of the statute, and it was, therefore, competent for the justices to deal with him as such; and that even if it might be possible also to include Hancock, the lessee, within the meaning of the word 'owner' in the interpretation clause, yet that they had no power to discharge one person from a liability which they considered to be cast upon him by statute by reason only that a second person might be equally or in some other way liable with him.

They were, therefore, of opinion that the appellant was in default, and amenable to the provisions of s. 12 and following

(1) 29 & 30 Vict. c. 90, s. 21. The nuisance authority or chief officer of police shall, previous to taking proceedings before a justice under the 12th section of the Nuisances Removal Act, 1855, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, on the owner or occupier of the premises on which the nuisance arises, to

abate the same, and for that purpose to execute such works and do all such things as may be necessary, within a time to be specified in the notice; provided, first, that where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner . . .

sections of 18 & 19 Vict. c. 121; and they made an order upon the appellant to do the works necessary, and which were in effect to convert the privy into a water-closet.

The questions for the Court were, first, whether the works ordered were structural works; and, secondly, whether the appellant was the statutory "owner" of the premises on which the nuisance arose; and if so, whether, under the stated circumstances, he was, as such, liable to an order to effect structural works for the abatement thereof; and, lastly, whether the justices were correct in point of law in their determination, and had power to make the order.

Bailey, for the appellant. By the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 14, that Act and the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), are to be read as one Act; by s. 21, when the nuisance arises from the want or defective construction of any structural convenience, notice to do the works necessary for the abatement shall be served on the *owner* of the premises, previous to the nuisance authority taking proceedings before a justice, under s. 12 of 18 & 19 Vict. c. 121; and by s. 2 of that Act, "owner" includes any person receiving the rents of the property in respect of which the word is used from the occupier of such property, on his own account, or as trustee or agent for any other person" Cook, therefore, was not the "owner" within the definition, for he received the rent from Hancock, and Hancock was not the occupier of the property, having underlet to Mrs. Kingston. She was the occupier of the premises where the nuisance arose, and Hancock, receiving the rent from her, was the owner. (1)

H. James, Q.C. (~~Church~~ with him), for the respondent.

[BLACKBURN, J. Allen let to Hancock for twenty-one years, he sublets a portion of the premises; it is true, he does not sublet the whole, but Mrs. Kingston was in exclusive occupation of the part on which the nuisance was, and Hancock had no access to that part of the premises. How can Cook, therefore, be sued as receiver of the rent from the occupier of the property?]

Hancock only temporarily underlet a part. If Cook is not the

(1) He cited several cases, but as the Court thought them inapplicable, they were under other statutes, the He also argued the other points, as to definition of "owner" being different, which the Court expressed no opinion.

1872 COOK v. MONTAGU.	"owner," then Hancock is, and it will be a great hardship on him who is only lessee with a lease nearly expired; the Act intended, it is clear, that the person who is substantially owner, or his agent, should be looked to, and not a person in the position of Hancock.
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BLACKBURN, J. I think the parties have been mistaken, and have proceeded against the wrong person. I give no opinion whatever on the other points. Assuming the nuisance to have arisen from the defective construction of a structural convenience, the local authority are to proceed against the "owner" of the premises on which the nuisance arises. Cook was certainly not the "owner" in the ordinary sense of the term; but by the interpretation clause (s. 2 of 18 & 19 Vict. c. 121), "owner includes any person receiving the rents of the property in respect of which that word is used from the occupier of such property on his own account, or as trustee or agent for any other person." The object was on the one hand, that a structural improvement should be thrown upon the owner, and that the local authority should not be bound to proceed against temporary occupiers who might also not be worth powder and shot; but, on the other hand, inasmuch as it might often be very difficult indeed to ascertain who were the real owners, and the collectors of rent might easily be found, this definition of "owner" was given; and in a vast number of cases they would thus reach the real owner; though sometimes, as in the present case, the definition would throw the burthen on a person not intended. Cook received the rent from Hancock, but Hancock is not the occupier. I quite agree that if Mrs. Kingston had given notice to quit and had left the premises, Cook would then have been liable, but as matters stood Hancock was owner and Cook was not. For ninety-nine out of a hundred cases the general rule given by the interpretation clause would work justice, though in the hundredth it may work injustice.

HANNEN and QUAIN, JJ., concurred.

Judgment for the appellant.

Attorneys for appellant: *T. White & Sons, for G. H. Cook, Bath.*

Attorneys for respondent: *Dobinson & Geare, for Moger, Bath.*

SKINNER, APPELLANT; USHER, RESPONDENT.

1872

May 1.

*Hackney Carriage—Plying for Hire elsewhere than at a Standing—6 & 7**Vict. c. 86, s. 33.*

By 6 & 7 Vict. c. 86, s. 33, a penalty is imposed on the driver of a hackney carriage who shall ply for hire elsewhere than at some standing appointed for the purpose :—

Held, that the plying for hire within this section must be in some public street or place; and that the driver of a hackney carriage, who plied for hire on an open unenclosed piece of private ground, to which the public had access, but over which there was no public right of way, was not within the section.

CASE stated by a Metropolitan Police Magistrate under 20 & 21 Vict. c. 43.

The appellant was a licensed driver of a hackney carriage, and appeared in answer to a summons which charged that the appellant did on, &c., at the parish of Putney, within the metropolitan police district, unlawfully ply for hire with the said hackney carriage elsewhere than at some standing or place appointed for that purpose.

The appellant is the servant of one Clipson, who is a cab proprietor and the occupier of a public-house situate in High Street, Putney, immediately opposite to the railway station of the London and South Western Railway there. In front of the principal entrance of the public-house, and between it and the main street, is a vacant piece of unenclosed ground, which is and has usually been for many years occupied with the public-house, and is open to the street and frequented by the public, but is private property and not subject to any right of passage by them.

Clipson has for many years been used to cause his cabs to stand upon this piece of unenclosed ground ready for the conveyance of passengers. On the day in question the appellant, by the orders of Clipson, was in charge of a licensed hackney carriage ready for the conveyance of passengers standing upon the piece of unenclosed ground. He was hailed by a person at or near the railway station, upon which he drove the carriage across the street and took up the person so hailing him, drove away, and, after an interval of about twenty minutes, returned and remained with the carriage upon the

1872

SKINNER

v.

USHER.

piece of unenclosed ground ready for the conveyance of passengers as before.

No part of the piece of unenclosed ground has ever been appointed by any lawful authority as a standing whereon hackney carriages may ply for hire ; but there is a place so lawfully appointed at a short distance from it in the High Street.

On behalf of the complainant, the respondent, it was contended that the facts above set forth were evidence of a breach of the provisions of 6 & 7 Vict. c. 86, s. 33.

On the part of the appellant it was contended that there was no evidence of any plying for hire at all ; or that, if there was such evidence, there was no evidence of any plying for hire in a public street or place, and that in order to create a breach of the provisions of 6 & 7 Vict. c. 86, s. 33, there must be a plying for hire in a public street or place.

The magistrate convicted the appellant ; the following being the grounds of his decision : 1st. That the appellant having his carriage ready for the conveyance of passengers in a place frequented by the public, was plying for hire, although the place was private property. 2nd. That it was not necessary, in order to constitute a breach of the provisions of 6 & 7 Vict. c. 86, s. 33, that there should be a plying for hire in a public street or place. 3rd. That if it was so necessary, the facts above set forth disclose evidence on which the magistrate might lawfully find that there was a plying for hire in a public street or place.

If the Court should be of opinion that there was any evidence on which the magistrate could lawfully convict the appellant under 6 & 7 Vict. c. 86, s. 33, then the conviction was to be affirmed, otherwise it was to be quashed.

April 24. *Edward Clarke*, for the appellant. The conviction was under s. 33 of 6 & 7 Vict. c. 86, which subjects to a penalty "every driver of a hackney carriage who shall ply for hire elsewhere than at some standing or place appointed for that purpose, or while loitering, or by any wilful misbehaviour, shall cause any obstruction to or upon any public street, road, or place." This statute, by s. 3, extends the operation of 1 & 2 Wm. 4, c. 22, to the area of the metropolitan district, and the two Acts

must therefore be read together. By s. 4 of the earlier Act, hackney carriage is defined to be a carriage standing or plying for hire in any public street, or road, at any place within the distance of five miles from the Post Office; and in *Case v. Storey* (1) it was held that this section overrode the other sections of the Act, and that consequently a carriage was not plying for hire within ss. 35 and 42, at a railway station, because it was not a *public* place, although the word "public" does not occur in those sections. A similar construction must be applied to s. 33 of the later Act, and "elsewhere" must mean elsewhere in a public road or place.

1872
SKINNER
v.
USHER.

[QUAIN, J. In 6 & 7 Vict. c. 86, s. 2, the definition of hackney carriage is different from that in s. 4 of 1 & 2 Wm. 4, c. 22; it is, "every carriage which shall stand on hire, or ply for a passenger for hire, at any place within the limits of the city of London and metropolitan police district."]

Place must mean public place; the definition was not intended to alter the kind of place at which the plying for hire was to be, it was only intended to extend the area to which the Act should apply. "At any place," means that "any place" in s. 4 of the earlier Act, shall be extended to any place within the new limits, and the new definition must be read, plying for hire at any public street or road, at any place within the new limits. *Clarke v. Stanford* (2) and *Allen v. Tunbridge* (3) may be cited contra; but those cases were decided under s. 4, of 32 & 33 Vict. c. 115; and it may well be that a different construction should be put on that statute, as to the necessity of all carriages being licensed when plying for hire, whether in a public or private place, because, when hired, they ought to be under proper control wherever they happened to have been hired. But the present section applies not to the carriage, but to prevent the public thoroughfares from being crowded by hackney carriages plying for hire.

Sir J. D. Coleridge, A.G. (*Archibald* and *Beasley* with him), for the respondent. This piece of ground was a public place, being unenclosed and open to the public. But secondly, it need not be public to be within s. 33. There is a marked distinc-

(1) Law Rep. 4 Ex. 319.

(2) Law Rep. 6 Q. B. 357.

(3) Law Rep. 6 C. P. 481.

1872

SRINNER
v.
USHER.

tion between the sections of 1 & 2 Wm. 4, c. 22, under which *Case v. Storey* (1) was decided, and the sections of 6 & 7 Vict. c. 86. In the first place the definition of "hackney carriage," in s. 2, omits all mention of "public road or street," and has only "at any place," and a precisely similar change in the phraseology of the Act was the ground of the decision in *Clarke v. Stanford*. (2) Moreover, in the second branch of this very section as to loitering, public street, road, or place is used, shewing that in the first branch "public" was intentionally omitted, and "place" only used.

Clarke was heard in reply.

Cur. adv. vult.

May 1. The judgment of the Court (Blackburn, Hannen, and Quain, JJ.) was delivered by

BLACKBURN, J. [After stating the facts.] We think the magistrate was right in his first finding, that the appellant was plying for hire. The second question is, whether he was within s. 33 of 6 & 7 Vict. c. 86, and was liable to a penalty for "plying for hire elsewhere than at some standing or place appointed for the purpose." It is obvious that, if the appellant was liable to a penalty, any cab-driver waiting to take up passengers at a railway station would be equally liable. We, however, think that the legislature did not intend to prohibit such a plying for hire. The previous Act was 1 & 2 Wm. 4, c. 22, by s. 4 of which it is enacted, that "every carriage with two or more wheels, which shall be used for the purpose of standing or plying for hire in any public street or road, at any place within the distance of five miles from the General Post Office, in the city of London . . . shall be deemed and taken to be a hackney carriage within the meaning of this Act." In *Case v. Storey* (1) it was held that "any street or place," in s. 35 of that Act, must be read with reference to s. 4, and that s. 35 therefore applied only to a carriage standing in a public place, and did not apply to a cab standing on the private ground of a railway station; and that decision we think quite right, and that that Act did not intend to interfere with a carriage plying for hire on private ground. That Act was confined to five miles from the General Post Office. Then came 6 & 7 Vict. c. 86, under which

(1) Law Rep. 4 Ex. 319.

(2) Law Rep. 6 Q. B. 357.

this conviction took place, which is in *pari materie*, and must be read together with 1 & 2 Wm. 4, c. 22. It, at first sight, certainly seems to vary the definition of "hackney carriage," which (by s. 2) "shall include every carriage (except a stage carriage) which shall stand on hire or ply for a passenger for hire at any place within the limits of the city of London and the liberties thereof, and the metropolitan police district." Whereas the first Act defines "hackney carriage" as any carriage standing or plying for hire in any public street or road, at any place within five miles of the Post-Office, the second Act extends the definition to any carriage standing or plying for hire at any place within the metropolitan police district. We think, however, on the true construction of the later Act, that it was not intended by this alteration to alter the definition or the nature of the place wherein the plying for hire should take place, simply because it says "at any place," instead of "in any public street or road at any place;" but the intention was merely to extend the limits to the whole metropolitan police district instead of within five miles of the Post-Office; and that the same kind of place was still intended, viz., any public street or road at any place within the extended area. If that be so, and the definition in the two Acts of "hackney carriage" be the same, then the same interpretation must be put on s. 33 of the later Act as was put on s. 35 of the other Act; and the driver of a hackney carriage would only be liable to a penalty for plying for hire elsewhere, that is, in some public place other than on an appointed standing; and if he be not plying for hire in a public place he would not be within the section: so that cabs waiting for passengers at a railway station would not be within the Act, and neither would the ground on which the appellant's carriage stood be "elsewhere" within the meaning of the Act, not being public ground. This construction of the Act is confirmed by reference to ss. 30 and 32. In s. 32 "place" must mean "public place," streets, and roads, or thoroughfares; and so in s. 30 a standing is not to be appointed except in the centre part of the street, unless in the case of a street with houses only on one side of it, seeming to indicate that the commissioners can only appoint standings in public streets. Though it might be read, no doubt, to mean that when they appoint a standing in a street it shall only be in the centre of it. It appears

1872

SKINNER

v.
USHER.

1872
SKINNER
v.
USHER.

clear, however, to us that the legislature was only, in s. 33, contemplating a plying for hire in a public place, and that as a driver of a hackney carriage was not bound under the first Act to accept a fare when plying for hire not in a public place, so under the other Act he would not be liable to penalty for plying for hire in the same place. We cannot believe that the legislature intended, in 6 & 7 Vict. c. 86, by a mere sidewind to put an end to the practice of cabs standing for hire at railway stations.

It was said that the construction we are prepared to put on the Act would give an unfair advantage to the owners of private ground; but we do not think the legislature can be supposed, when making regulations for hackney carriages, to have intended to place every person who happened to be a cabowner on an equal footing. The Act was passed alio intuitu.

Then it was argued that the case of *Clarke v. Stanford* (1) was an authority against this construction of the Act. But that case is quite consistent with our present decision, and was quite right on the construction of the Act there in question. That case turned on 32 & 33 Vict. c. 115, and the definition of hackney carriage in that Act was quite different from the present; for after saying that the limits of the Act shall be the metropolitan police district and the city of London, and after defining "stage carriage" as "any carriage for the conveyance of passengers which plies for hire in any public street, road, or place within the limits of this Act," the Act proceeds to define "hackney carriage" as meaning "any carriage for the conveyance of passengers, which plies for hire within the limits of this Act, not being a stage carriage," purposely making the distinction between stage carriage and hackney carriage, and in the definition of the latter omitting "public place."

The appellant, therefore, who was not plying for hire in a public street or road, was not plying "elsewhere" than at an appointed standing, within the clause.

Judgment for the appellant.

Attorney for appellant: *Willoughby.*

Attorneys for respondents: *Solicitors to Treasury.*

(1) Law Rep. 6 Q. B. 357.

ELLIOTT AND OTHERS, APPELLANTS; MAJENDIE, RESPONDENT.

1872

May 1.

Gunpowder Act, 1860 (23 & 24 Vict. c. 139), ss. 2, 4—Duty to erect Lightning Conductors in Connection with Gunpowder Magazines.

By the Gunpowder Act, 1860 (23 & 24 Vict. c. 139), s. 2, par. 9, "Every maker of gunpowder shall cause to be erected good and sufficient lightning conductors in connection with every store magazine where gunpowder is kept by him." By s. 4, "All gunpowder in any mill, press-house, corning-house, drying-house, or other place exceeding the quantity which for the time being may lawfully be therein, shall be forfeited; and every person keeping or causing to be kept in any such mill or place any gunpowder contrary to the provisions hereinbefore contained, shall for so doing, in addition to such forfeiture as aforesaid, forfeit for every such offence any sum not exceeding 2s. for every pound of gunpowder so forfeited":—

Held, that gunpowder manufacturers, who kept gunpowder in a store magazine without having provided lightning conductors, could not be proceeded against under s. 4 for keeping gunpowder contrary to the provisions of the Act.

CASE stated by Justices of Cornwall under 20 & 21 Vict. c. 43.

An information was preferred on behalf of the respondent, an inspector of gunpowder manufactories under the Gunpowder Act, 1860, against the appellants, charging that on, &c., at a certain gunpowder manufactory in their occupation, they, being makers of gunpowder, did have a store magazine for the keeping of gunpowder, and in which certain gunpowder was then kept by them, they not having caused to be erected or provided good and sufficient thunder rods or lightning conductors in connection with such store magazine for the protection of such magazine from the effects of lightning, and did thereby make and keep, and cause to be made and kept, gunpowder contrary to the said Act.

By the Gunpowder Act, 1860 (23 & 24 Vict. c. 139), s. 2, under which the information was laid, par. 9, "Every maker of gunpowder shall cause to be erected and provided good and sufficient thunder rods or lightning conductors in connection with every store magazine where gunpowder is kept by him, for the protection of such magazine from the effects of lightning."

By s. 4, "All gunpowder made in any place where under this Act it is not lawful to make gunpowder, and all gunpowder in any mill, press-house, corning-house, drying-house, dusting-house, or other place, exceeding the quantity which for the time being may lawfully be therein, shall be forfeited; and every person making or causing to be made any gunpowder contrary to this Act, or keeping or causing to be kept in any such mill or place, any gunpowder contrary to the provisions hereinbefore contained, shall for so doing, in addition to such forfeiture

1872

ELIOTT
v.
MAJENDIE.

as aforesaid, forfeit for every such offence any sum not exceeding two shillings for every pound of gunpowder so forfeited.

"Every person making gunpowder without having such store magazine or magazines one hundred and forty yards distant from any mill and every other place used by him for or in the manufacture of gunpowder, shall forfeit any sum not exceeding twenty-five pounds for every month during which such person makes gunpowder without having such magazine or magazines.

"And every person making gunpowder, who wilfully neglects or delays removing with due diligence the finished gunpowder made at his mill or mills and the other places used by him for or in the manufacture of gunpowder from thence, or from the magazine or storehouses used therewith, to the store magazine or magazines distant as aforesaid, shall forfeit for every day during which such offence continues any sum not exceeding five pounds."

It was proved that the appellants were makers of gunpowder, and had a store magazine for the keeping of gunpowder, in which certain gunpowder was then kept by them, and they had not caused to be erected or provided good and sufficient thunder rods or lightning conductors, in connection with such store magazine, for the protection of such magazine from the effects of lightning. That on the day when the inspection took place which led to the information being laid, there were ten barrels, each containing 100 lbs. of gunpowder, in the store magazine.

The respondent contended that the appellants had kept gunpowder contrary to the provisions of the Act, and had rendered themselves liable to the penalties prescribed by s. 4, viz., a forfeiture of the whole of the 1000 lbs. of gunpowder, as well as a fine of 100%, being at the rate of two shillings for every pound of gunpowder so forfeited.

The appellants contended that, notwithstanding the appellants were proved to have kept gunpowder in a store magazine which was not provided with any thunder rod or lightning conductor, yet they did not keep gunpowder contrary to the provisions of the Act in such manner as to bring it within the scope and meaning of s. 4. They contended that s. 4 did not apply at all to such a case, and that, in point of fact, the Act imposed no penalty whatever in respect of not providing lightning conductors to store magazines; that s. 4 applied only to places for or in the manufacture of gunpowder, and in which gunpowder is kept in excess of the quantity allowed by the Act, and not to store magazines, in which any quantity of gunpowder may be kept after being manu-

factured, the Act not fixing any limit in respect of such quantity. They also contended that the words "or other place," occurring in s. 4, must be construed to mean other place ejusdem generis with "mill, press-house, corning-house, drying-house, and dusting-house," immediately preceding those words, all such houses and places being used in the manufacture of gunpowder only, and not for the purpose of storing gunpowder; and that inasmuch as s. 4 imposed specific penalties for other offences under the Act, such as not having any store magazine 140 yards distant from any mill or other place used in the manufacture of gunpowder, or not removing with due diligence the finished gunpowder from such mill or other place to such store magazine, but did not impose any specific penalty for not providing lightning conductors to store magazines, either the legislature intended that no such penalty should be imposed, or it was a *casus omissus*.

The justices were of opinion that s. 4 did apply to par. 9 of s. 2, and that the appellants were proved to have kept gunpowder contrary to the provisions of the Act, and within the scope and meaning of s. 4; and they accordingly convicted the appellants, and declared the whole of the 1000 lbs. of gunpowder found in such store magazine to be forfeited, and adjudged the appellants to pay the sum of 50*l.*, being at the rate of one shilling for every pound of gunpowder so forfeited.

The question for the Court was, whether the appellants, by having a store magazine for the keeping of gunpowder, and in which gunpowder was kept by them, they not having caused to be erected or provided good and sufficient thunder rods or lightning conductors in connection with such store magazine for the protection of such store magazine from the effects of lightning, did thereby keep or cause to be kept gunpowder contrary to the provisions of the Gunpowder Act, 1860, and thus render themselves liable to the penalties imposed by s. 4.

Lopes, Q.C. (*Bradford* with him), for the appellants, urged the same points as were made before the justices.

The respondent did not appear.

BLACKBURN, J. There are no words in s. 4 sufficiently large to

1872

ELLIOTT

v.

MAJENDIE.

1872

ELLIOTT
v.
MAJENDIE.

comprehend the offence of keeping a store magazine without thunder rods contrary to the last clause of s. 2. The only words at all applicable to the case are "every person . . . keeping or causing to be kept in any such mill or place, any gunpowder contrary to the provisions hereinbefore contained;" but then follow the words, "shall for so doing, in addition to such forfeiture as aforesaid, forfeit for every such offence, any sum not exceeding 2s. for every pound of gunpowder so forfeited;" so that when there is a forfeiture then there is to be a penalty in addition; and the only case in which the forfeiture is incurred is where gunpowder is kept exceeding the quantity limited; but there is no limit to the quantity to be kept in a store magazine, so that it is clear that in terms the present case is not included, and it is difficult to make any sense that would include it. By s. 2, the maker of gunpowder is to keep a good and sufficient magazine for keeping the gunpowder manufactured, but there is no restriction of quantity to be stored there. All that we need say on the present occasion is that the appellants have not kept in any such mill or place gunpowder contrary to the provisions of the Act within the meaning of s. 4. Whether the neglect to erect proper thunder rods makes them liable under some other section it is unnecessary to consider.

MELLOR, J. I have come to the same conclusion, though with some hesitation; but, on the whole, I think that the offence proved against the appellants is not within s. 4.

LUSH, J. I am of the same opinion. The latter part of s. 4 does not apply to the offence proved. Previous sections prescribe the quantity of powder to be made or kept under different circumstances, and the first part of s. 4 causes all powder to be forfeited which is made or kept contrary to those provisions, and the latter clause is clearly only applicable to those cases in which the powder is forfeited under the former part of the section; and therefore is not applicable to not providing proper lightning conductors.

Judgment for the appellants.

Attorneys for appellants: *Wedlake & Letts.*

THE RECEIVER FOR THE METROPOLITAN POLICE DISTRICT *v.*
BELL.

1872

May 3.

Appropriation of Penalties in Metropolitan Police District—Jurisdiction as to Penalties of Two Justices sitting in District—Receiver of Police District—
2 & 3 Vict. c. 71, s. 47; 3 & 4 Vict. c. 84, s. 6.

By 2 & 3 Vict. c. 71, s. 47, "When by any Act penalties or shares of penalties are or shall hereafter be made recoverable in a summary manner before any justices of the peace, and by the Act the same are or shall be limited to the queen, or some person other than the informer or party aggrieved, in every such case the same, if recovered or adjudged before any of the said" [metropolitan police] "magistrates, shall be received for and adjudged to be paid to the receiver" [of the metropolitan police district] "for the time being." By 3 & 4 Vict. c. 84, s. 6, any two justices having jurisdiction within the metropolitan police district shall have, while sitting together publicly in the petty sessions court or room, except in divisions assigned to the police courts, all the powers, privileges, and duties which any one magistrate of the police courts has by 2 & 3 Vict. cc. 47 and 71:—

Held, that this did not make penalties, which were recovered before two justices sitting as above, penalties recovered before a police magistrate; and that therefore the shares of such penalties unappropriated to the informer or party aggrieved did not go to the receiver of the metropolitan police district.

CASE stated after writ without pleadings.

The plaintiff is "the receiver for the metropolitan police district," and is empowered by 24 & 25 Vict. c. 124, to sue and be sued in that name. The defendant is clerk to the justices for the petty sessional division of Kingston-upon-Thames, in the county of Surrey.

In July, 1870, Thomas Powill was convicted by justices of the said division, sitting in petty sessions at Kingston-upon-Thames, under 5 & 6 Wm. 4, c. 63, for having light weights, and fined. Under s. 32 the moiety of the fine is payable to the treasurer of the county in which it is recovered. In September, 1870, George Webber, a baker, was convicted before the justices as aforesaid under 6 & 7 Wm. 4, c. 37, s. 7, and fined. By s. 17 the moiety at least of the fine goes to the overseers or some other officer of the parish or place in which the offence was committed. The fine in each case was received by the defendant as clerk to the justices to be applied according to law.

1872

RECEIVER OF
POLICE
v.
BELL.

Kingston-upon-Thames and the places where the offences were respectively committed are within the limits of the metropolitan police district, but not within a division assigned to any police court.

The plaintiff, as such receiver, claims a moiety of the fines, under 2 & 3 Vict. c. 71, s. 47.

The question for the Court was whether he was so entitled.

Field, Q.C., (*F. M. White* with him), for the plaintiff. By 2 & 3 Vict. c. 71, an Act for regulating the metropolitan police courts, s. 47, "where by any Act or Acts, any penalties or forfeitures, or shares of penalties or forfeitures, are or shall hereafter be made recoverable in a summary manner before any justice or justices of the peace, and by such Act or Acts respectively the same are or shall be limited and made payable to Her Majesty, or to any body corporate, or to any person or persons whatsoever, save the informer who shall sue for the same, or any party aggrieved, in every such case the sum, if recovered or adjudged before any of the said magistrates, shall be recovered for and adjudged to be paid to the said receiver" [of the metropolitan police district] "for the time being, and not to any other person." "Before any of the said magistrates," no doubt means any of the metropolitan police magistrates; but by 3 & 4 Vict. c. 84, s. 6, "Any two justices of the peace having jurisdiction within the metropolitan police district shall have, while sitting together publicly in the court or room used for holding special or petty sessions of the peace in any part of the said district within the limits of their commission, except in the divisions to be assigned to the police courts already established, and any two justices of the peace for the city of London and the liberties thereof, having jurisdiction within the city of London and the liberties thereof, shall, within the said city and the liberties thereof, have all the powers, privileges, and duties which one magistrate of the said police courts has while sitting in one of the said courts by the two recited Acts," that is, by 2 & 3 Vict. cc. 47 and 71. In the present case, therefore, the justices had all the power, duties, and privileges of a police magistrate, and, consequently, the fines imposed must be taken to have been adjudged by one of the police magistrates, and therefore

go under s. 47 of 2 & 3 Vict. c. 71, to the receiver of police. The preamble of 3 & 4 Vict. c. 84, and the repeal by s. 1 of ss. 75 and 76 of 2 & 3 Vict. c. 47, shew that it was intended to put two justices acting as mentioned in s. 6, in precisely the same position as a police magistrate.

Thesiger, contra, was not heard.

COCKBURN, C.J. Sect. 6 of 3 & 4 Vict. c. 84, extends the power, duties, and privileges of the police magistrates to justices having jurisdiction within the police district under certain circumstances; but it does not enact that penalties recovered before such justices shall be considered as recovered before one of the police magistrates, nor that a moiety shall go to the receiver of the metropolitan police district.

BLACKBURN, J. By s. 47 of 2 & 3 Vict. c. 71, half of the penalties, "if recovered before any of the said magistrates," that is, any of the police magistrates, shall go to the receiver; but there is nothing in s. 6 of 3 & 4 Vict. c. 84, to make penalties recovered before justices having jurisdiction in the district "penalties recovered before one of the said magistrates."

LUSH and QUAIN, JJ., concurred.

Judgment for the defendant.

Attorneys for plaintiff: *Ellis & Ellis.*

Attorney for defendant: *F. F. Smallpiece.*

1872
RECEIVER OF
POLICE
v.
BELL.

1872

May 3.

MARTINEAU AND OTHERS v. KITCHING.

Buyer and Seller—Construction of Contract of Sale—"Goods at Risk of Seller for Two Months"—Insurance by Seller of Goods.

14 April 1872 The plaintiffs, sugar refiners, were in the habit of selling to brokers the whole of each filling of sugar, consisting of from 200 to 300 loaves or "titlers" each, the terms always being "Prompt at one month; goods at seller's risk for two months," the "prompt" day being the Saturday next after the expiration of one month from the sale. The titlers in each filling were stored on the plaintiffs' premises, and were from time to time fetched away by the purchasers or their sub-vendees, being weighed on their removal, each titler weighing from thirty-eight to forty-two pounds. If the whole of the lots contained in one sale-note had not (which was frequently the case) been taken away on the "prompt" day payment was made by the purchaser (by bill or cash) at an approximate sum calculated on the probable weight, the actual price being afterwards adjusted on the whole filling being cleared.

The defendant, who was an old customer of the plaintiffs, had bought four fillings, consisting of specific titlers, each marked, on the above terms, and had paid the approximate price of the four lots, and had fetched some of each lot away. A fire occurred on the plaintiffs' premises after the expiration of the two months from the dates of sale to the defendant, destroying the whole contents of the warehouses. At the time of the fire the plaintiffs had floating policies of insurance which covered goods on the premises "sold and paid for, but not removed;" but they had no agreement or understanding with their customers as to any insurance; and the amount insured, which the plaintiffs received from the underwriters, was not sufficient to cover the loss of their own goods, exclusive of the titlers undelivered which they had sold to the defendant:—

Held, by Cockburn, C.J., on the ground that the property in the titlers undelivered had passed to the defendant, by Blackburn, Lush, and Quain, JJ., whether it had passed or not, that, by the terms of the contract of sale, the risk, after the lapse of the two months, was in the buyer, and the loss was, therefore, his. Secondly, that, as there was no contract between the plaintiffs and their customers as to insurance, the plaintiffs were under no obligation in the matter, and were entitled to appropriate to their own losses the whole sum received from the insurance offices.

Semble, by Blackburn and Lush, JJ., that the property in the titlers undelivered had passed to the defendant.

CASE stated by an arbitrator pursuant to an order of nisi prius.

This action was brought to recover the price of certain sugars sold by plaintiffs to defendant, and destroyed by a fire which took place upon the premises of the plaintiffs in April, 1870. (1)

1. The plaintiffs are sugar refiners carrying on business, under

(1) See par. 21.

the name of David Martineau & Sons, in Christian Street, St. George's in the East; and the defendant is a sugar broker carrying on business at St. Mary-at-Hill, in the city of London.

1872

MARTINEAU
v.
KITCHING.

2. Raw sugar in the progress of being refined is boiled in vacuum pans. The entire quantity boiled at one time and under the charge of one man is termed "a filling." One filling is generally the produce of two vacuum pans, but sometimes of one only; always, however, the entire contents either of one pan or two.

3. The filling, when it is taken from the pans, is poured into inverted conical moulds, where it remains some days to harden and whiten. It is thus formed into sugar-loaves, or, according to the trade name, "titlers." As soon as the sugar in the moulds is sufficiently hard and white for the purpose (in five or six days) a number and mark are scratched on the bottom of each titler, to indicate the particular filling to which it belongs. Some days later (three or four days), when they have further sufficiently hardened, the titlers are taken from the moulds and wrapped in paper, and the same number and mark which have previously been scratched on the bottom of each titler are then written in red chalk upon the paper in which it is wrapped.

4. Every titler of the same batch or filling, and therefore of the same quality, bears upon the bottom of it and upon the paper in which it is wrapped the same number and mark, and the number and mark thus appropriated to the titlers of that one particular filling are not used for those of any other filling until the turn of that particular number and mark comes round again in rotation (usually in about seventeen weeks), by which time all the former fillings which have borne that number and mark have always been sold, and nearly always delivered out of the warehouse.

5. After being wrapped in paper and marked with chalk as above mentioned, the filling of titlers is taken to the drying stove for the purpose of being thoroughly dried and hardened. When this process is accomplished, titlers become, in the language of the trade, "stove goods," and are fit for sale.

6. Each filling is then taken from the drying stove to the warehouse, where it is stored away separately from the other fillings, and kept so separate until it is delivered to the customer as hereinafter mentioned. It does occasionally happen that some

1872
MARTINEAU
v.
KITCHING.

titlers of one filling may become intermixed with those of another filling, but such instances are accidental and of rare occurrence.

7. The sales are made by sample, and each sale consists almost invariably of one or more fillings. Two samples of each filling are taken to the counting-house, and upon a sale being effected one of these samples is delivered to the purchaser, and the other is retained by the vendor, and a sale-note is also at the same time delivered to the purchaser, which contains the following words printed on the face of it: "Prompt one month. Discount one per cent. Stoved goods at seller's risk for two months; other goods for one month."

8. Besides the terms above mentioned, the sale-note states the marks and numbers of the filling or fillings sold, the number of titlers in each filling, and the price to be paid per cwt. This form of contract was generally adopted by the trade (as between the sugar refiners and their customers) some six or seven years ago. Before that time the sale-note contained only these particulars, viz., the marks and number of the filling, the number of the titlers sold, and the prices; and nothing was stated in it as to the "prompt," discount, or period of risk. By the custom of the trade, however, the "prompt" was then two months instead of one, and within the two months the goods were usually cleared away, although in some exceptional cases they were left at the refiner's warehouse beyond that period. In those instances the plaintiffs have sometimes threatened to charge their customers warehouse rent, but in point of fact no warehouse rent was ever charged or paid. The plaintiffs have, however, occasionally, after the lapse of the two months, had the goods weighed and sent off to the customer. Both before and after the change in the "prompt," the plaintiffs were in the habit of keeping floating policies upon all stock in their warehouse, making no distinction between goods sold and goods unsold.

9. The titlers from time to time vary in weight from 30 lbs. to 42 lbs. each, but at the time when the contracts hereafter mentioned were entered into between the plaintiffs and the defendant, the weight of titlers varied from 38 lbs. to 42 lbs., those of the same filling being as nearly as possible of uniform weight. Immediately after each sale entries are made by the plaintiffs in

their warehouse-book, sale-book, and day-book, of the name of the purchaser, the number of titlers in the filling or fillings sold, and the numbers and marks of such filling or fillings.

10. The goods after the sale remain in the plaintiffs' warehouse till they are delivered to the customer. They are delivered indifferently either to the customer himself, should he require them, or to sub-purchasers from him, upon the presentation by such sub-purchasers of delivery orders given to them by the customer, and they are delivered in such portions and quantities as are specified in such delivery orders.

11. When delivery is made to sub-purchasers weight notes are sent by the plaintiffs to the customer, giving the marks and weight of the titlers, when bought, and to whom delivered.

12. The goods are paid for on the Saturday after the expiration of one calendar month from the day of sale, which Saturday is called in the trade "the prompt;" but the whole or portions of the goods sold often remain in the plaintiffs' warehouse after the time for payment when it suits the convenience of the customer to delay the delivery, in which cases the customer pays on the prompt either in cash or by bill an approximate sum to the price.

13. On some few very exceptional occasions, as, for instance, in the month of December, 1870, when a large and sudden demand for sugar has arisen, the plaintiffs have taken specific lots of sugar which they had sold, or contracted to sell, to customers, but were lying in their warehouse to supply the exigencies of the market giving to their customers in lieu of these other sugars of an equal or better quality. This they have done without consulting the customer and running the risk of any objection which he might make, but no such objection has in fact ever been taken.

14. On the Monday after the expiration of two calendar months from the day of sale the plaintiffs' practice is to send to the customer an overdue notice in the form mentioned in par. 25, stating what goods purchased by him remain in their hands, and that such goods are then lying at his risk; but it frequently happens that these notices are not sent, and whether they are or not the plaintiffs, as a rule, do not insist upon the immediate removal of the goods when it suits the purchaser's convenience to keep them longer in the plaintiffs' warehouse. It has occasionally

1872

MARTINEAU
v.
KITCHING.

1872
MARTINEAU
v.
KITCHING.

happened that after the lapse of the two months goods have been weighed and sent off to the customer; but instances of this kind have been very rare. No charge is ever made by the plaintiffs against the customer either for warehousing or insurance.

15. With the exception of the above few instances the sugars sold are never weighed until delivery, when they are taken to the scales on their way from the warehouse to the cart of the customer or his nominee.

16. It is the custom of the plaintiffs, and of other sugar refiners, to keep on foot floating policies of insurance on the stock from time to time on their premises all of which policies contain a clause in the following terms: "Mem. This policy is now declared to cover stock the property of the assured and including goods sold and paid for but not delivered on the premises within mentioned," and the fact of such insurances being kept up by the refiners is generally known to their customers.

17. The merchants and sugar brokers (including the defendant) who are in the habit of dealing with the plaintiffs and other sugar refiners, purchase the sugars to sell to the wholesale grocers. They keep as a rule no warehouses or stores of their own, and the sugars purchased by them usually remain at the warehouses of the refiners until resold. It is by no means unusual for the sugar to remain at the refiners' warehouses beyond the two months, although they are more generally removed within that period.

18. An impression prevails extensively in the trade, both amongst refiners and their customers (in which impression, however, the plaintiffs do not share) that the sugars whilst in the warehouse remain at the refiners' risk, even after the expiration of the two months mentioned in the sold-note, until they have been actually weighed and an invoice sent to the purchaser, and until a notice has also been sent to the purchaser that the sugars are thenceforth at his risk. It was contended, and some evidence given before the arbitrator on the part of the defendant, that there was a general custom or usage in the trade to this effect; but the arbitrator does not find that any such custom has ever existed.

19. The plaintiffs and the defendant have dealt together for many years in the manner above described; and the defendant has frequently at the plaintiffs' instance purchased large quantities

of sugar, which both parties had reason to believe would not be cleared altogether from the warehouse within the two months, and considerable portions of which have, in fact, remained in the warehouse beyond that period.

20. On the 15th of January, 1870, the plaintiffs sold, or contracted to sell, to the defendant 1090 titlers comprised in the four fillings then manufactured and lying stored (each filling apart) and marked in their warehouse. The following is a copy of the sold note:—

“Sold to Mr. W. Kitching.

Prompt, one month. Discount	40 pl.	354	} Tits. @ 47s.
one per cent. Stoved goods	40 —	245	
at seller's risk, for two months: other goods, for	40 =	252	
one month.	40 ≡	239	

“D. Martineau & Sons, January 15, 1870.”

The numbers and marks in the first column represent the particular filling sold, and are the same as those scratched upon the bottom of each titler of the filling and upon the wrapper of it. They are called respectively “forty plain,” “forty stroke,” “forty two-stroke,” “forty three-stroke.” At the time of the sale there were no other titlers lying stored in the plaintiff's warehouse bearing the same numbers and marks. The numbers in the second column indicate the number of titlers in the filling; the word “tits,” which then follows, is the abbreviation for titlers; and then follows the price in shillings, which is known to be per cwt.

21. Entries of these sales to the effect mentioned in par. 9 were immediately made by the plaintiffs in their warehouse-book, sale-book, and day-book. Before the fire, the plaintiffs drew upon the defendant for an approximate sum to the price of the said four fillings, and the defendant duly accepted and paid the bills before the fire. After the fire, the defendant, disputing his liability to bear the loss incurred in respect of the titlers which remained undelivered and were burnt, the plaintiffs consented that the payment by bill, in so far as it applied to the titlers in dispute should be appropriated to other items of account between them, without prejudice nevertheless to any rights which such payment might have conferred upon the plaintiffs or to their claims against the defendant for the titlers so burnt.

1872

MARTINEAU
v.
KITCHING.

*Book 436
Page 44*

1872
MARTINEAU
v.
KITCHING.

22. Between the 15th of January and the 16th of March, 1870, the defendant resold portions of the said titlers, and gave to various sub-purchasers orders upon the plaintiffs for the delivery of the said portions giving the number of marks of the titlers.

23. In accordance with the orders, the plaintiffs, from time to time, delivered to the sub-purchasers titlers to the number and of the mark specified in the delivery orders, and such portions were weighed over to and taken away by the sub-purchasers. Upon each occasion of the delivery of titlers to a sub-purchaser a weight note in the form mentioned in par. 11 was made out and delivered by the plaintiffs to the defendant.

24. The plaintiffs sold further fillings of titlers to the defendant on the 20th of January, the 16th of February, and the 22nd of February, 1870, in respect of which sales a similar course of dealing and delivery took place to that which has been described with respect to the sale of the 15th of January.

25. On the 21st of March, 1870, being the Monday next after the 15th of March, 1870, the plaintiffs delivered to the defendant a notice : "Please remove the following sugars now lying here at your risk : 40 tits. bought January 15th, 43 tits. bought January 20th, and 44 tits. bought January 20th."

26. After this notice, and before the fire, further deliveries were made to other persons who had purchased from the defendant portions of the goods comprised in the said sale-notes under similar circumstances to those mentioned in par. 21 and 22.

27. At the time of the fire 967 of the titlers comprised in the sale-notes of the 15th and 20th of January, and the 16th and 22nd of February, remained in the plaintiffs' warehouses and had not been weighed. The plaintiffs, however, were enabled to form an approximate estimate of their weight and value from their knowledge of the quality of the goods and the weight of other titlers which had been made about the same time. The total number of titlers in the plaintiffs' warehouses at the time of the fire was 12,121.

28. The number of titlers included in the overdue notice delivered to the defendant on the Monday next after the 15th of March, 1870, and remaining upon the plaintiffs' premises undelivered at the time of the fire, and burnt, was 375, and their value due was 270*l*. No overdue notice was proved to have been

delivered by the plaintiffs to the defendant relating to the titlers included in the sale-note of the 16th of February, 1870, although the Monday upon which, in accordance with the ordinary practice of the plaintiffs, such notice should have been delivered was the 18th of April. The number of these titlers undelivered at the time of the fire and burnt was 239, and their value was 203*l.* 2*s.* No overdue notice was delivered by the plaintiffs to the defendant relating to the titlers included in the sale-note of the 22nd of February, 1870; but with respect to these, the Monday upon which, in accordance with the said practice of the plaintiffs, notice should have been delivered, was the 25th of April, and had not arrived at the time of the fire. The number of titlers included in the last-mentioned sale-note remaining upon the plaintiffs' premises undelivered at the time of the fire and burnt was 323, and their value was 270*l.*

29. On Sunday, the 24th of April, 1870, a fire broke out on the plaintiffs' premises, by which stock-in-trade of the estimated value of 35,117*l.* 6*s.* 7*d.* was destroyed or damaged, and amongst such stock were 932 out of the said 967 titlers comprised in the said sale-notes, and remaining as aforesaid undelivered. The price of these 932 titlers the arbitrator finds to be 743*l.* 2*s.*

30. At the time of this fire the stock and goods upon the plaintiffs' premises were insured by such policies, as have been before described, at several offices, in the total sum of 30,200*l.*

31. The claim made by the plaintiffs upon these offices for loss and damage on stock and goods amounted to 35,117*l.* 7*s.* 6*d.*, which claim included all stock and goods upon the premises at the time of the fire, manufactured and unmanufactured, and sugars sold, or contracted to be sold, by the plaintiffs, but not delivered. These last-mentioned sugars comprised the said 932 titlers mentioned in the said sale-notes, and eighty-two titlers sold, or contracted to be sold, to two other persons which had remained on the plaintiffs' premises for more than two months from the date of the contract of sale. These 932 and 82 titlers respectively were the only stoved goods on the premises which had been sold, or contracted to be sold, and were lying overdue, and in sending in their claim to the offices the plaintiffs made no distinction between these last-mentioned goods and other stock-in-trade.

1872

MARTINEAU
v.
KITCHING.

1872

MARTINEAU
v.
KITCHING.

32. The whole amount insured, that is to say, the said 30,200*l.*, less only a sum of 322*l.* 5*s.*, which was deducted in respect of the over insurance of a particular stove, leaving the sum of 29,877*l.* 15*s.*, was allowed and paid to the plaintiffs by the insurance offices, and in addition to such sum the plaintiffs were allowed to retain salvage of the said stock to the value of 2733*l.* 10*s.*, leaving therefore a loss sustained upon the stock and goods on the premises, and not covered by the policies, to the amount of 2506*l.* 2*s.* 6*d.*

33. The value of the total salvage from the fire amounted to the sum of 3835*l.* 10*s.*, of which 1102*l.* was sold to the plaintiffs by the insurance offices, and the remaining 2733*l.* 10*s.* was retained by the plaintiffs, as in the preceding paragraph mentioned.

34. The proportion of the said sum of 2733*l.* 10*s.* applicable to the said 932 titlers has been fixed by consent of the parties at 150*l.*, and it is agreed that this sum is to be allowed by way of set-off in reduction of the plaintiffs' claim in the event of the Court deciding that the plaintiffs are entitled to recover the price of the undelivered titlers.

35. The remaining thirty-five out of the 967 titlers were saved uninjured from the fire, and were afterwards sold by the plaintiffs without consulting the defendant upon the subject; and it does not appear that the defendant objected to this sale, or ever made any claim to the said thirty-five titlers.

[Paragraphs 36-38 set out particulars of the insurances on the goods in different warehouses, which it is unnecessary to give.]

39. The plaintiffs contend that they are entitled to recover in this action the sum of 743*l.* 2*s.*, being the price of the undelivered titlers after deducting from that sum the 150*l.*, which they are willing to allow as the proportion of salvage due to the defendant; and the plaintiffs further contend that they are not bound under any circumstances to make any allowance to the defendant in respect of the said insurance moneys.

40. The defendant contends, 1, that the plaintiffs are not entitled to recover any sum in respect of the undelivered titlers; 2, if they are so entitled, that the defendant should be allowed by way of set-off or otherwise as against the sum claimed by the plaintiffs such a proportion of the insurance money received by the plaintiffs as would be applicable to the 932 titlers; or (in other

words) that the defendant is entitled to the benefit of the insurance moneys received by the plaintiffs in the proportion which the value of the 932 titlers bears to the total value of the goods destroyed ; which is agreed at 540*l*.

1872

MARTINEAU
v.
KITCHING.

The Court was to have power to draw inferences of fact, and to make any amendments in the pleadings which they may think necessary or proper.

The questions for the opinion of the Court were: 1st. Whether the plaintiffs are entitled to recover the price of the undelivered titlers. (1) 2ndly. If so, whether the defendant is entitled by way of set-off, or otherwise, to any and what allowance in respect of the insurance moneys.

April 30. *Holker, Q.C.* (*Greenhow* with him), for the plaintiffs. The first question is, whether the property in the undelivered titlers had passed to the purchaser at the time of the fire. This was the purchase of specific titlers marked, and the sale-note provides that they shall be at seller's risk for two months. The two months had elapsed after each sale before the fire occurred. The property passed to the purchaser on the sale, or at any rate after the two months, and when the fire took place they were at his risk, and he must bear the loss. It will be contended contra, that as the weight had not been ascertained the property did not pass. But where something remains to be done to goods, whether the property in them passes or not, depends on the intention of the parties: see *Benjamin on Sale*, pp. 221, et seq., citing from *Blackburn on Sale*, pp. 151-152. Here the intention was that the property should pass. Moreover, the parties having stipulated that for two months the risk should be in the vendors, that implies that after that time the goods should be at the risk of the purchaser. Although the exact weight was not ascertained, the weight was known near enough to enable the plaintiffs to recover. *Simmons v. Swift* (2) will be relied on contra; but there the declaration was for goods sold and delivered, and there had been no delivery; the action, therefore, could not be maintained. It cannot be otherwise supported according to the later cases. *Turley v. Bates* (3) decides that the rule does not

(1) See par. 21.

(2) 5 B. & C. 857.

(3) 2 H. & C. 200; 33 L. J. (Ex.) 43.

10/11/72 H.S. 3/68

1872

MARTINEAU
v.
KITCHING.

apply where something is to be done by the buyer, but may to cases where something remains to be done by the seller. Here the buyer ought to have taken away the goods and had them weighed. The Court, moreover, lays it down as a general rule that the intention of the parties is to be looked at in every case. And this principle was acted on in *Kershaw v. Ogden* (1) and in *Young v. Matthews*. (2) Here it is clear from the whole case that the intention was, that although the exact weight was not ascertained yet the sugar was to become the property of the purchaser. Secondly, the goods of the defendant have not been insured: the words of the policies limit the insurance to goods in which the plaintiffs are interested, and it does not extend to those goods which have passed to the defendant. Moreover, the plaintiffs have not received sufficient to cover their own loss, and, *primâ facie*, the insurance must be taken to be for their own benefit: *North British Insurance Co. v. Moffatt* (3), *Waters v. Monarch Assurance Co.* (4), and *London & North Western Ry. Co. v. Glyn*. (5).

May 3. *J. Brown, Q.C.* (*Thesiger* with him.) First, the sugar has been destroyed before it was weighed, and it being impossible to ascertain the price the property did not pass. Secondly, the defendant is entitled to be paid to the extent that the plaintiffs have received money from the insurance office. The inference to be drawn from the facts is, that the sellers insured the goods beyond the two months, and the expense of the insurance is included in the price of the sugar; and the further inference is that it is obligatory on the sellers to insure, but, whether obligatory or voluntary, still the defendant is entitled to a proportion of the insurance money they have received. On the first point *Hanson v. Meyer* (6) is directly in point, that when goods are to be weighed before the price can be ascertained the property does not pass, although part of the same lot of goods has been weighed and delivered. This was affirmed in *Logan v. Le Mesurier* (7): see Lord Brougham's judgment; and is recognized in *Gilmour v. Supple* (8), in the judgment

(1) 3 H. & C. 717; 34 L. J. (Ex.) 159.

(5) 1 E. & E. 652; 28 L. J. (Q.B.) 188.

(2) Law Rep. 2 C. P. 127.

(6) 6 East, 614.

(3) Law Rep. 7 C. P. 25.

(7) 6 Moo. P. C. 116, 127, 133, 134.

(4) 5 E. & B. 870; 25 L. J. (Q.B.)

(8) 11 Moo. P. C. 551, 567.

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delivered by Sir C. Cresswell. In the former case, Lord Brougham expressly recognizes the authority of *Simmons v. Swift*. (1)

[QUAIN, J. In *Turley v. Bates* (2) it was held that the mere fact that the goods had to be weighed would not prevent the property passing.]

In Benjamin on Sale, pp. 226-8, that case is reviewed amongst others, and it is pointed out that the weighing was to be by the buyer.

[BLACKBURN, J. The late case of *Castle v. Playford* (3), in the Exchequer Chamber, has decided that it is immaterial in whom the property was; the question is, at whose risk the goods were. Can there be any doubt of that here?

COCKBURN, J. If the property in the goods had not passed to the buyer, why was it said that the goods should remain at the risk of the sellers for two months?]

The judgment of Lord Brougham in *Logan v. Le Mesurier* (4) governs this case. He says: "To constitute a sale which shall immediately pass the property, it is necessary that the thing sold should be certain, should be ascertained in the first instance, and that there should be a price, either ascertained or ascertainable. But the parties may buy or sell a given thing, nothing remaining to be done for ascertaining the specific thing itself, but the price to be afterwards ascertained in the manner fixed by the contract of sale . . ." The last is precisely the present case, and his lordship goes on to say, "In applying this doctrine to the contract before us there may be some doubt raised by the peculiarity of the terms, inasmuch as, on the one hand, a certain chattel is sold, and a price fixed in reference to an assumed measurement, the statement of which is parcel of the contract, and the price is to be paid immediately, with a reserved right for the one party to recover part of the price, and for the other party to receive more, in case that assumption shall prove to have been incorrect; while, on the other hand, the seller is to retain possession, to carry the chattel to a certain place, and to make the measurement before the delivery." Nothing can be more like the facts of the present case; and the conclusion the Court arrived at is thus stated: "But taking the

1872

MARTINEAU
v.
KITCHING.

(1) 5 B. & C. 857.

(3) Law Rep. 7 Ex. 98.

(2) 2 H. & C. 200; 33 L. J. (Ex.) 43.

(4) 6 Moo. P. C. at pp. 132, 133.

10 per 45360

1872
MARTINEAU
v.
KITCHING.

whole of these terms together, it appears to us that, until the measurement and delivery were made, the sale was not complete, there being nothing in the terms to shew an intention that the property should pass before the measurement; but, on the contrary, the intention rather appearing to be that the transfer should be postponed until the measurement at the delivery." So here the property did not pass as there had been no weighing and delivery.

[COCKBURN, J. There the seller was bound to deliver; here it was the duty of the buyer to come and take the goods.]

Holker, Q.C., was not heard in reply.

COCKBURN, C.J. This is an action brought to recover the price of certain sugar alleged to have been sold by the plaintiffs to the defendant. The sugar perished by fire while it was still upon the premises of the sellers, and the defence raised is twofold—first, that the property in the sugar had not passed from the plaintiffs, the sellers, to the defendant, the buyer, and consequently the loss must fall upon the sellers; secondly, that, even supposing that were decided against the defendant, inasmuch as these goods were covered by an insurance effected by the plaintiffs, and the plaintiffs had received the amount insured with respect to these goods, the defendant is entitled to have what the plaintiffs have so received in respect of the goods set off in his favour against the price.

The first question is, whether at the time these goods perished by fire they were the property of the sellers, the plaintiffs, or the property of the buyer, the defendant. In order to decide that, as well as to decide the second question in dispute, we must look to see what was the course of dealing which existed between these parties. [The Lord Chief Justice stated the facts.]

Now, that being the state of things existing between these parties, the first question is, whether, the contract between them being in conformity with the general course of dealing to which I have adverted, when these goods perished by fire, the property had passed from the sellers to the buyer. In my opinion it had, both upon general principles and more especially with reference to the particular facts of this case and the terms of the contract between the parties. In dealing with the case of a contract we must bear

in mind that the seller engages to do two main things, first, to pass the property in the thing sold; secondly, to deliver possession of it. The buyer engages to take the thing which he has contracted to buy, and to pay the price; and, undoubtedly, in such a contract, one of the essential elements to constitute a contract of sale is that the price shall be agreed upon. But there is nothing, as it seems to me, to prevent the parties from agreeing that the property shall pass, and that the price shall afterwards be ascertained, that which is capable of being reduced to a certainty being for practical purposes a thing already certain or ascertained.

Now the question here is, whether the property passed. It appears that the price had not been finally adjusted, but it is equally clear that the parties had agreed upon a price estimated between them as the sum to be taken provisionally as the price for the goods. The question which presents itself to my mind is whether, independently of the question how far, when the price is still to be ascertained on the sale of a specific chattel, the property passes, the parties having agreed that provisionally a given sum shall be taken as the price, that does not shew a clear intention on the part of both buyer and seller that the property shall pass.

It is very true, as has been ably contended by Mr. Brown, that there are authorities for saying that, where the price remains to be ascertained, the property will not pass. But I think it is equally clear, upon the authorities, that, according to the view now taken of this branch of the law, the question is one of intention between the parties. I take it now to be perfectly clear, especially after the case of *Turley v. Bates* (1), that the real question in all these cases is, whether the parties did intend that the property should pass; and I take it, that in this respect no fault can be found with the law of England if a distinction exists between our law and the civil law in this respect. It is perfectly true, that where anything remains to be done with a view to the appropriation of the thing agreed to be sold by the seller to the buyer, it is plain that the property will not have been intended by him to pass to the buyer, and the property will not have passed. But it is equally clear that, in point of principle, and in point of common sense and practical wisdom, there is nothing to prevent a man from passing the

1872

MARTINEAU
v.
KITCHING.

(1) 2 H. & C. 200; 33 L. J. (Ex.) 43.

1872

MARTINEAU
v.
KITCHING.

property in the thing which he proposes to sell and the buyer proposes to buy, although the price may remain to be ascertained afterwards. We are dealing with the case of a specific chattel. I agree to sell to a man a specific thing—say a stack of hay, or a stack of corn? I agree to sell him that specific thing, and he agrees to buy it; the price undoubtedly remains an element of the contract, but we agree, instead of fixing upon a precise sum, that the sum shall be ascertained by a subsequent measurement. What is there to prevent the parties from agreeing that the property shall pass from one to the other, although the price is afterwards to be ascertained by measurement. I take it that is the broad substantial distinction. If, with a view to the appropriation of the thing, the measurement is to be made as well as the price ascertained, the passing of the property being a question of intention between the parties, it did not pass because the parties did not intend it to pass. But if you can gather from the whole circumstances of the transaction that they intended that the property should pass, and the price should afterwards be ascertained, what is there in principle, what is there in common sense or practical convenience which should prevent that intention from having effect? I protest I can see none; and unless there are authorities absolutely conclusive upon the point, I will not give way to a rule which appears to me to militate against principle, and to be inconsistent with common sense and convenience. In this particular case it is not necessary to say what would be the law applicable, if we had now to consider, for the first time, or as a Court of error, which we are not, the question in the case of *Simmons v. Swift*. (1) But this case, I think, is plainly distinguishable from *Simmons v. Swift* (1), by reason of more than one circumstance. The first to which I shall advert is, that the price is agreed upon between the parties provisionally, according to their estimate of the quantity which the titlers contain. Can it be said that after that price has been paid at the prompt, although there is a further term in the contract between the parties that they shall eventually ascertain by an accurate weighing whether more or less than the price which the parties intended has been paid; can it be said that it was intended after the price provisionally

1872

MARTINEAU
v.
KITCHING.

agreed upon has been paid at the prompt, that the property is still to remain in the sellers and not to be transferred to the buyer? I do not think it is possible to hold anything which would be so inconsistent with what is obviously the intention of the parties. All that they intended to do by the final weighing was to see whether they had accurately ascertained the amount, which, according to the terms of the contract, they intended that the one party should pay and the other should receive. Then there is a further circumstance which appears to me of importance in this case, and which brings it clearly within the principle, as I think, of the case of *Castle v. Playford* (1), the recent case in the Exchequer Chamber, that is, that by the terms of this contract, the goods, while they remained in their possession—or in their custody is the more proper term—in their warehouse during the two months, were to be at the risk of the sellers, the plaintiffs. As I pointed out in the course of the argument, what would be the necessity, what would be the object or purpose of such a stipulation that the goods should be at their risk during the two months if the property still remained in them? Of course it would then be at their risk. Moreover, according to the course of dealing between the parties, at the expiration of the two months, notice is given to the buyer, which notice the buyer accepts, and which notice the present defendant in his dealings with the plaintiffs had invariably accepted without remonstrance or objection, that upon the expiration of the two months the goods, though still remaining in the custody of the plaintiffs, should stand at the buyer's risk. That brings the case at once within the principle of the decision in *Castle v. Playford* (1), and shews that at that time, at all events, the property in the goods was intended by common consent of both buyer and sellers to be in the defendant, the buyer.

I think, therefore, looking at all the circumstances of the case, it is impossible to doubt that the true intention of the parties, as well as by contemplation, and effect of the law, was that the property was in the buyer and no longer in the sellers at the time of the fire, and therefore the thing, having perished, perishes to the dominus, namely, the buyer, and not to the sellers, who had ceased to have anything to do with it.

(1) Law Rep. 7 Ex. 98.

1872

MARTINEAU
v.
KITCHING.

The second question is whether, the goods having been destroyed by fire and having been covered by an insurance, and the plaintiffs having received the whole insurance upon the policies, the defendant is entitled to have a proportion of the amount received by them from the insurance offices set off for his benefit against the amount of the price. I think that he is not. First, I may observe that it is perfectly clear that from the expiration of the two months the plaintiffs, the sellers, were not bound by any agreement, express or implied, to keep up an insurance upon these goods against fire. That, I think, is not a thing the affirmative of which can for a single moment be contended. Now, supposing that they are not under an agreement, and no consideration is given to keep up an insurance on these goods, and that they had effected an insurance which covered the goods at the time of the loss, would they be bound to hand over the proceeds to the party whose goods they had insured? I doubt it extremely; but it is not necessary to decide it. No doubt if they had received an amount covering the goods they would have received it, or at all events would have kept it, wrongfully as against some one. But it is not necessary, I think, to decide that question in this case, and for this reason: it appears to me perfectly clear upon all the facts of the case that the plaintiffs effected this insurance, not with any view to the protection of the defendant, but solely with a view to their own protection. They are bound to keep the goods at their risk for a period of two months. They would naturally cover that risk by an insurance co-extensive with that period. The insurance once effected it would be impossible so to adjust their insurances, which are floating policies, to the particular periods of two months, within which the buyers are entitled to keep the goods upon the premises of the sellers, but do not always do so, and any period beyond the two months for which the goods might still remain in the custody of the sellers. But I take it that the whole of this has had its origin in a notion,—which the arbitrator, however, does not confirm,—a notion that there was a liability on the part of the sellers to make good any loss which might arise by fire throughout the whole period that the goods remained in their custody, although that period might extend beyond the two months. I think that, in all probability, it was

with a view to some such possible contingency, and to the risk that they might run of having that question decided against them, if ever it should arise, that the sellers have been in the habit of having floating insurances to cover all goods upon their premises. I cannot entertain a doubt that it was intended for their own protection, and not for the protection of anybody else; and therefore, although it is true that the policies effected covered all the goods upon the premises, yet, inasmuch as the policies were not sufficient in amount to cover anything beyond their own goods, it is clear that the insurers would have been bound to pay them the whole of the money secured by the policy. I think, therefore, that having got only so much as was sufficient to make good, indeed, not quite sufficient to make good the whole of their own loss, they were not bound to apportion the proceeds of the insurance, which they had intended for their own protection, to satisfy the loss of some one else, against which loss they were not bound to effect an insurance for the protection of that some one else. Consequently they were entitled to apply the whole of the amount which they received under the policies of insurance to indemnify themselves against the loss which they themselves had actually sustained, and were not bound either in law or equity, or morally, to apply any portion of it to the protection of the defendant, for whose benefit they were not bound either by express contract, implication, or custom to effect the insurance.

I think, therefore, upon that point also, the defence fails, and our judgment must be for the plaintiffs.

BLACKBURN, J. I am also of opinion that our judgment must be in favour of the plaintiffs. The case arises in this way. [The learned judge referred to par. 21, and stated the facts.] The difficulty which is raised is, that these goods had perished before they were actually weighed; and two points were made by Mr. Brown; he contended that because they had not been weighed the property had not passed, and that it therefore followed, as an inexorable rule of law, that they were not to be paid for, because they were still the property of the plaintiffs. This, however, I do not think is the correct way of putting the case, and I do not think that we need decide whether the property passed or not. As a general rule, res

1872

MARTINEAU
v.
KITCHING.

1872

MARTINEAU
v.
KITCHING.

perit domino, the old civil law maxim, is a maxim of our law; and when you can shew that the property passed the risk of the loss, *primâ facie*, is in the person in whom the property is. If, on the other hand, you go beyond that, and shew that the risk attached to the one person or the other, it is a very strong argument for shewing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other. In the present case I think all that is necessary to decide is, that the risk was not in the sellers. When the first month had elapsed, and payment had been made, still the buyers had, from their express stipulation, a right to have the goods remain a month at the refiners' warehouse at the refiners' risk. Let us suppose that the refiners had become bankrupt. If in consequence of the risk being in the refiners, which by this stipulation it clearly would be during the two months, the property was still in the refiners, their assignees in bankruptcy would take the entire property, and the buyers, who had paid the approximate price, would be obliged to come in and prove, and get so many shillings in the pound as they might be able to prove for. That would be a monstrous hardship, and in such a case as that I should be very much inclined to struggle very hard to find any legal reason for saying that, though the risk remained in the sellers, yet the property had passed to the buyers as soon as they had made the payment. If the question arose in such a case as that, I am rather inclined to think it would be necessary to look carefully into *Simmons v. Swift* (1), and some other cases, to see if one could decide that the property had passed. But in this case that does not arise; the second of the two months had elapsed, during which the stipulation was that the goods were to be at the sellers' risk. I think *expressio unius est exclusio alterius*. I cannot construe that stipulation, except as implying that at the expiration of the two months the goods are to be at the buyer's risk. That construction would be greatly fortified, if it required fortification, by the fact that at the end of the two months the sellers did send a note to remind the buyer that the goods are at his risk; and this being a stipulation between two parties, who

(1) 5 B. & C. 857.

are both sui juris, that they are to be at the buyer's risk after the two months, the question is, is that effectual at law?

Mr. Brown's argument was, that the goods must be at the sellers' risk, because, as he contended, the property had not passed to the buyer. I have already intimated that, if it were necessary, I should consider very long before I said that. However, assume that it had not passed. If the agreement between the parties was, "I contract that when you pay the price I will deliver the goods to you, but the property shall not be yours, they shall still be my property so that I may have dominion over them; but though they shall not be yours, I stipulate and agree that if I keep them beyond the month the risk shall be upon you;" and then the goods perish; to say that the buyer could then set up this defence and say, "Although I stipulated that the risk should be mine, yet, inasmuch as an accident has happened which has destroyed them, I will have no part of that risk, but will throw it entirely upon you because the property did not pass to me," is a proposition which, stated in that way, appears to be absolutely a *reductio ad absurdum*; and that is really what the argument amounts to. If the parties have stipulated that, if after the two months the goods remain in the sellers' warehouse, they shall, nevertheless, remain there at the buyer's risk, it would be a manifest absurdity to say that he is not to pay for them; and I think the case of *Castle v. Playford* (1) is a clear authority of the Court of Exchequer Chamber, that where the parties have stipulated that the risk shall be on one side, it matters not whether the property had passed or not. The parties here have by their express stipulation impliedly said, after the two months the goods shall be at the risk of the buyer, consequently it is the buyer who must bear the loss.

Then Mr. Brown said, "But how can the buyer pay when he was to pay at 47s. per cwt., and the goods have never been weighed, and therefore it would never be known with certain precision how many cwt. there were?" I answer to that, in the first place, that the point is concluded by the authority of *Alexander v. Gardner* (2), *Turley v. Bates* (3), and the recent case of *Castle v. Playford* (1) in the Exchequer Chamber, which all go to shew that where the price

1872

MARTINEAU
v.
KITCHING.

(1) Law Rep. 7 Ex. 98.

(2) 1 Bing. N. C. 671.

(3) 2 H. & C. 200; 33 L. J. (Ex.) 43. 10/11/45360

1872
MARTINEAU
v.
KITCHING.

is not ascertained, and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser, by ascertaining the amount as nearly as you can.

There is another reason which in this case would clearly apply—the delay in weighing is quite as much the fault of the purchaser as of the sellers. When the prompt day comes the sellers have a right to require that the goods should be weighed at once, so as to ascertain the price, and to have it paid to the last farthing. It may be for the mutual convenience of both parties; but still it is the buyer, in effect, who requests that, as he is going to leave them longer, the weighing should be postponed for a time. Therefore it is in consequence of his delay that the weighing does not take place. Now by the civil law it always was considered that, if there was any weighing, or anything of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being in *morâ*, and it was his default, though the *emptio* is not *perfecta*, yet if it is clearly shewn that the party was in *morâ*, he shall have the risk just as if the *emptio* was *perfecta*. That is perfectly good sense and justice, though it is not necessary to the decision of the present case, that, when the weighing is delayed in consequence of the interference of the buyer, so that the property did not pass, even if there were no express stipulation about risk, yet because the non-completion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed. The inclination of my opinion is, as I have said, that the property is in the purchaser, but we need not decide that at all to-day, and it might require some consideration to see how far the case of *Simmons v. Swift* (1) really governs the case.

The other point goes to the reduction of the damages. The defendant contends that, under the particular circumstances of the case, he is entitled to have an allowance made to him in consequence of there having been insurances upon these goods kept up by the sellers, under which they did receive a very large sum in consequence of that fire; and the defendant's contention is, that they

(1) 5 B. & C. 857.

are bound to give him an aliquot part of the insurance money, in the proportion that his goods which were burnt bore to the others, and that is agreed to be 540/. But I do not think that he has made out that he is entitled to the insurance at all. There are circumstances with regard to that part of the case which I do not feel it necessary to decide. In the first place, the policies are floating policies kept up by the refiners to cover all goods on their premises, and at the back of each is this memorandum: "This policy is now declared to cover stock the property of the assured, and including goods sold and paid for but not delivered, on the premises within mentioned." And it was contended, first, that upon that insurance as it stood the insurance company were bound to pay for goods that were on the premises which had been paid for, and which were not at the risk of the refiners; that the bargain between them covered such goods, and that they were bound to pay for them. That Mr. Holker contested, and that is one point upon which I have not thought it necessary to make up my mind. It may be that the insurance is such,—as in the case of *London and North Western Ry. Co. v. Glyn* (1),—that the insurance company are bound to pay for these goods in which the assured were not interested at all. It may also be, as in the case of *North British Insurance Company v. Moffatt* (2), that the policy may be so worded that the assured are not entitled to recover, and the insurance company are not bound to pay anything except for the goods which were the property of the assured. I have not thought it necessary to make up my mind which case this is. I will assume in favour of the defendant, that the policies of insurance are such that if the policies had not only covered the loss upon the refiners' own goods, and the goods which were lying there for two months at their risk, in which they clearly had an interest, but were also sufficient to cover the goods which were left on the premises beyond the two months, the plaintiffs would be bound to pay the defendant the whole of the money applicable to his goods. Assuming that in favour of the defendant, the argument, as I understand it, is rested upon the statement in the 16th paragraph of the case; and the contention was that from this custom and usage it must be implied to be part of the bargain between the re-

1872

MARTINEAU
v.
KITCHING.

(1) 1 E. & E. 652; 28 L. J. (Q.B.) 188.

(2) Law Rep. 7 C. P. 25.

5 per 100

1872
MARTINEAU
v.
KITCHING.

finers and their customers, that the refiners would keep up these policies for the customers' benefit; if that were so, I am inclined to think, although it is not necessary to decide it, that it would follow that they ought to apply an aliquot part of the amount they recovered on the policy to the persons with whom they had made that arrangement. Parties may make a specific bargain of that sort. It is very common for a warehouseman to keep up very large and extensive floating policies to cover the goods in his hands, and let it be known generally that he was doing so, so that people would come to him in hopes that they would have the benefit of that insurance in case of loss. In that case I think the Court might very properly draw the inference that it was part of the understood bargain, that persons dealing with him would have the benefit of that insurance. But in the present case I can draw no such conclusion at all. The refiners, so far from wishing to induce people to keep their goods in their warehouses, wish them very much to take them away after the two months.

It was further argued that, if the plaintiffs, though not bound to do it at all, had happened to find when the fire took place that they had been paying premiums to insurance companies, which would entitle them to claim for these goods which were not their own, and which were not lying at their risk, yet if they did so, and either from the company paying it voluntarily, or from enforcing it as in *London and North Western Ry. Co. v. Glyn* (1), they actually got it for the defendant's goods, they must be taken to have got the money on his behalf; and there would arise a trust from that enforceable in equity, and I suppose enforceable in law also, that they should hold the money for the benefit of the defendant, although the defendant had no right to complain if they did not recover that money. I will not express any opinion on that, it may or may not be; but that does not arise in the slightest degree here, because in point of fact the plaintiffs, although undoubtedly when they sent in their claim to the insurance companies they named all the goods in their possession on their premises, without distinguishing which were over the two months and which were under, have not received a farthing more than they were entitled to receive for the goods which were their own

(1) 1 E. & E. 652; 28 L. J. (Q.B.) 188.

5 Jan 25/1884

property, or at their risk; in fact, they received less. Therefore, although there might have been some possible contention that, if they had recovered more, they would have been obliged to give it to the defendant, they were not bound to postpone their own claim; and to say that they are bound to apply some of that to the payment of the defendant, seems to me contrary to justice and to law.

I therefore think that the damages should not be reduced, and that the judgment should be for the plaintiffs for the larger sum which the arbitrator has stated.

LUSH, J. I am also of opinion that the defendant is liable to pay the value of these goods which were destroyed by fire. The first question is, at whose risk were the goods at the time of the fire, at the risk of the sellers or at the risk of the buyer? Where goods are sold and there is no express stipulation in the contract to the contrary, in order to determine at whose risk the goods were at any given time, you have to ascertain in whom the property was vested at that time; and it is quite settled by the cases that this is a question of intention to be collected from the terms of the contract. If that were the question here, I should have no hesitation in inferring from the terms of this contract that the parties intended the property to vest in the buyer from the time of the sale. If they did so agree, the property would vest, although something was to be done to the goods before delivery in order to ascertain the amount to be paid. But I agree that the question is not in whom the property was, but at whose risk the goods were, and I collect clearly from the terms of the contract that it was agreed between the parties that after the expiration of two months the goods were to be at the risk of the buyer. This appears to me to follow by necessary implication from the terms of the contract, which contains this memorandum: "Prompt one month, discount one per cent., stove goods at sellers' risk for two months, other goods for one month." Therefore, the buyer was to pay for the goods an estimated approximate amount at the expiration of one month, then the goods were to be at the sellers' risk if the buyer chose to let them remain in the warehouse for a month longer; and the necessary implication from that is that at the expi-

1872

MARTINEAU

v.

KITCHING.

1872
MARTINEAU
v.
KITCHING.

ration of the two months they were to be at the risk of the buyer. That appears to me as plain as if those words had been expressed in the contract. Therefore, without saying in whom the property was vested, it seems to me to be clearly agreed between the parties that after the expiration of the two months the goods, if they remained in the plaintiffs' warehouse, were to remain at the risk of the defendant. The fire happened after the expiration of the two months, and therefore the defendant, the buyer, must be the loser.

The next question is, whether the buyer is entitled to claim any portion of the proceeds of the insurance as a set-off against the price of the goods. The only statement in the case upon that point is found in par. 16. From the facts that are stated there, I think it very clear that there was no contract on the part of the plaintiffs that they would insure the goods for the benefit of the defendant. On the other hand it must be taken, I think, from what is stated about the custom, that the defendant knew that there was a floating policy effected by the plaintiffs, and probably he trusted to that policy and forbore to insure on his own account. But then he must be taken to have known also that the value of the stock in the warehouses was fluctuating, that it might at one time be larger than the amount insured, and at another time be smaller, that the plaintiffs effected the policy for their own security, and therefore that it was a chance whether, if a fire were to happen, any part of the policy would be available for him. He chose to run the risk of that; the only chance he could ever have of getting any benefit from that policy would be if a fire were to happen at the time when there were not goods enough of the plaintiffs' own to answer the amount of the policy. He chose to run that risk; it so happened that at the time of the fire the goods of the plaintiffs were of greater value than the whole amount insured. The plaintiffs insured for their own protection, and not for his benefit, and they were therefore at perfect liberty to appropriate the whole of the amount insured to their own loss so far as it would go. It was known to the defendant throughout that the policy was intended as a security for the plaintiffs themselves. The plaintiffs were, therefore, entitled to appropriate it to the extent of their loss, and the consequence is that the

defendant can claim no part of that money derived from the insurance, as a set-off against the plaintiffs' claim.

1872

MARTINEAU
v.
KITCHING.

QUAIN, J. I am of the same opinion. I think with regard to the first question in the case, it may be decided upon the short ground that by the express contract between these parties, whether the property passed to the buyer or not, it was, if not expressly, impliedly agreed between them that the risk after the two months, should be in the buyer. I think it is admitted even by Mr. Brown in his argument, that the question of whether the property passed becomes immaterial, if you satisfy yourself upon the face of this contract that the parties had agreed that the risk should be in the buyer after the expiration of the two months. Now, seeing the express stipulation that the sellers should incur the risk during the first two months, and looking at the nature of the contract, and the practice between the parties, I can come to no other conclusion than that the agreement between them was that after the two months the risk should be in the buyer and not in the sellers; and as the fire happened after the two months, I think upon that short ground the plaintiffs are entitled to recover.

With regard to the second question, I had at first some little doubt about the matter, arising from the fact which is admitted on the face of this case, that the terms of the particular policies did include these goods, that a claim was actually sent in by the assured for these goods, and that they, in effect, received the whole amount of the policies. I had some doubt arising upon those facts, whether it could not be said that the assured did receive money on account of these goods; but on further consideration I have come to the opposite conclusion upon these grounds: I take it that this set-off could only be applicable to reduce the plaintiffs' claim upon two grounds, either that there was an express contract to insure as between the sellers and the customer, or that they entered into a voluntary insurance, and then having received money on account of these very goods, they retained that money which in equity they ought to hand over. I think both those grounds fail in the present case. I cannot infer from par. 16, that there was any such contract, and no such contract is found, nor, anything that would go to this extent, that an action would lie by the customer against the assured for not keep-

1872
MARTINEAU
v.
KITCHING.

ing up the policy or allowing it to drop, or for not effecting it. I think no such contract is found, and I do not think any such action would lie upon the facts as they appear before us. If there had been such a contract, then I think Mr. Brown would have made out his point, that as between the assured and the customer there was an obligation to insure; and if they received the whole of the insurance they must appropriate an aliquot part to the customer as far as his goods extend. For supposing they received money on account of these very goods, I take it that the cases of *North British Insurance Co. v. Moffatt* (1) and *London and North Western Ry. Co. v. Glyn* (2), decide that if they got the money on account of these very goods, and there are words sufficient in the policy to cover the goods, they ought to hand the money over to the customers. The difficulty in the defendant's way lies in this that the plaintiffs have not received money on account of these goods; they have only received a sufficient sum to cover a portion of their own loss, and if these goods are left out of the claim altogether or out of the policy altogether, they would not receive a sufficient sum of money to cover their loss, and therefore there is no equity between them and their customer. I find it so stated in Parsons on Contracts, vol. ii. p. 353: "If the goods are insured by a bailee having a lien upon them for charges, commissions, &c., and are described as goods held by him in trust, in an action brought by him in his own name, he recovers the whole value of the goods, and, after deducting his lien, he holds the balance in trust for the owner. But as between the insured and the owner of the goods held by him in trust, the owner cannot recover, unless it appears that he had elected to adopt the policy, before its force as an insurance upon his goods has been in any degree impaired by any act of the insured, or that the latter had actually received money from the insurance company on account of goods other than his own." He puts this as the result of the American authorities. That appears to me to be the principle of two English cases, that in order to raise any trust of that kind the customer must clearly shew that the assured, the seller, had received a portion of the money for and in respect of some other goods than his own. Two English cases have decided that where there is a trust, he ought to hand it

(1) Law Rep. 7 C. P. 25.

(2) 1 E. & E. 652; 28 L. J. (Q.B.) 188.

5 Jan MS. 1004

over, but that fails in this case in consequence of the amount of the policy not being sufficient to cover the assured's own goods, and therefore they have not received, in any proper or equitable sense of the term, any money in respect of these goods. For these reasons, I am of opinion that the set-off, or whatever it may be called, which Mr. Brown sets up,—the right to have an aliquot portion of the insurance money appropriated to his client fails; and therefore the plaintiffs, upon both grounds, are entitled to the judgment of the Court.

1872
MARTINEAU
v.
KITCHING.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Walker & Sons.*

Attorneys for defendant: *Linklater & Co.*

THE QUEEN v. STRACHAN.

April 29.

Stamp Duties—Voting Papers—Municipal Elections—Stamp Act, 1870 (33 & 34 Vict. c. 97), ss. 3, 102, & sch.—7 Wm. 4 & 1 Vict. c. 78, ss. 13, 14.

The Stamp Act, 1870 (33 & 34 Vict. c. 97; ss. 3, 102, & sch.)—which imposes a penny stamp on “Voting paper. Any instrument for the purpose of voting by any person entitled to vote at any meeting,”—does not extend to voting papers used, under 7 Wm. 4 & 1 Vict. c. 78, ss. 13, 14, at a meeting of the town council of a municipal borough for the election of aldermen.

RULE, calling on the defendant to shew cause why a quo warranto information should not issue to shew by what authority he exercised the office of alderman for the borough of South Shields.

At the election of aldermen of the borough in November, 1871, the defendant was elected by a majority of voting papers, under 7 Wm. 4 & 1 Vict. c. 78, s. 14. The voting papers were unstamped, and it was contended, when the rule was moved, that they ought to have had a penny stamp, and that consequently the votes were void, under the Stamp Act, 1870 (33 & 34 Vict. c. 97), ss. 3, 102, & subs. 4, & sch.

C. Russell, Q.C. (Hazelfoot with him), shewed cause. Voting papers at municipal elections are not within the Stamp Act, 1870 (33 & 34 Vict. c. 97). By s. 3 of that Act the stamp duties im-

1872

THE QUEEN
v.
STRACHAN.

posed by the Act, and no others, are to be charged. This virtually repeals the duties under 27 & 28 Vict. c. 18. By s. 1 and sch. C of that Act: "A Letter or power of attorney, commission, factory, or other instrument in the nature thereof, for the sole purpose of appointing, nominating, or authorizing any person to vote as a proxy or otherwise at any one meeting of the proprietors or shareholders of any joint-stock or other company, or of the members of any society or institution, or of the contributors to the funds thereof, or at one meeting of any body exercising a public trust in the United Kingdom, or to vote at one parish meeting of heriots or proprietors of real or heritable property in Scotland, *1d.*" Then follows immediately: "Voting paper, that is to say, any instrument for the purpose of voting by any person entitled to vote at any such meeting as aforesaid, *1d.*" The instruments requiring a stamp are arranged alphabetically in the new Act, and, instead of the above, the schedule has under letter L: "Letter or power of attorney, or commission, factory, mandate, or other instrument in the nature thereof: (1) For the sole purpose of appointing or authorizing any one person to vote as a proxy at any one meeting at which votes may be given by proxy, *1d.*" And under letter V: "Voting paper. Any instrument for the purpose of voting by any person entitled to vote at any meeting, *1d.*" And then is added immediately, "And see section 102." That section enacts that (2) "every letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper hereby respectively charged with the duty of one penny, is to specify the day upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified or any adjournment thereof." (3) A penalty of 50*l.* is imposed on any one using an unstamped proxy or voting paper. And (4) "every vote given or tendered under the authority or by means of any such letter or power of attorney or voting paper, not being duly stamped, shall be absolutely null and void." It cannot have been intended by this new enactment to do more than re-enact the former stamp duties on proxies and voting papers at meetings at which proxies are admissible. "Such" has accidentally been omitted by reason of "letter of attorney," &c., being divided by the alphabetical arrangement from "voting

paper." And if that is the real meaning, then voting papers at elections, at which proxies are not admissible, are not intended; and the election of aldermen is one of these, for by 7 Wm. 4 & 1 Vict. c. 78, s. 14, the election of aldermen is to be by means of voting papers, and the voters are personally to deliver the voting papers at the meeting to the mayor.

THE COURT then called upon

Holker, Q.C. (J. Edge with him), in support of the rule. No doubt, under the former Act, the penny stamp on voting papers was confined to voting papers used at "such" meetings, that is, at the meetings specified above. But in the present Act the words are quite general: "Voting paper. Any instrument for the purpose of voting by any person entitled to vote at *any meeting*." "Meeting" is the express term used in 7 Wm. 4 & 1 Vict. c. 78, ss. 13, 14, to denote the assembling of the town council for the purpose of electing aldermen. The reference, "And see s. 102," does not carry the matter any further, nor does it cut down the generality of the words "any meeting;" for s. 102 is equally general "at a meeting," without any words of definition or exception whatever. Had the reference in this schedule after "voting paper" been "and see ante Letter or power of attorney, &c.," it might have been well argued that it was intended to confine "voting papers" to such meetings as are there specified, viz., meetings at which votes are given by proxy, as in the former Act. But the generality of the terms used in the present Act must be taken to shew that the legislature intended to impose a penny stamp on all proxies and voting papers; and it will be a most forced construction to confine the stamp to voting papers at meetings where proxies are used.

COCKBURN, C.J. The rule must be discharged. It can never have been the intention of the legislature, by such an enactment as this, viz., by the use of the words "at any meeting" in the schedule, to have altered the whole system of voting at public elections. We must take it that the schedule to the new Act, having been alphabetically arranged, instead of as in the former Act, there has been an accidental omission of some words of reference, such as the word "such."

1872 BLACKBURN, J. Under "Letter of attorney" a stamp is im-
THE QUEEN posed on the instrument authorizing another to vote as a proxy at
v.
STRACHAN. any one meeting at which votes may be given by proxy; and, *primâ facie*, we should expect to find the stamp on voting papers, as in the former Act, confined in the new Act to voting papers at any such meeting. But "voting paper" being now separated from "letter of attorney," the word "such" seems to have dropt out.

LUSH, J. The imposition of a tax on voting papers at meetings where proxies are used was necessary to prevent unstamped voting papers being used as proxies.

QUAIN, J. A meeting of the town council to elect aldermen is clearly not such a meeting as was contemplated by the former Act; and I think we may gather from that, what kind of meetings was intended by the new Act, viz., meetings of charities, dock companies, and other companies, at which voting by proxy is allowed.

Rule discharged.

Attorneys for applicant: *John Scaife, for H. T. Duncan, South Shields.*

Attorneys for defendant: *Clarke, Son, & Rawlins, for Maxwell & Moore, South Shields.*

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF ST. MATTHEW, BETHNAL GREEN, RESPONDENTS *v.* THE GUARDIANS OF ST. IVES UNION, APPELLANTS.

1872
April 20.

Poor Law—Removal of Pauper—Irremoveability—Break of Residence—9 & 10 Vict. c. 66, s. 1.

A widow woman, aged seventy, who had resided in the parish of M. for many years, went into service in the same parish. She remained in service about six weeks, when, being too old for service, she left, saying she would have a holiday. She went on a visit to her son, who was living out of the parish, and stayed with him three days. She then went on a visit to a friend, who also lived out of the parish, and with whom she also stayed three days, and while there endeavoured to get work, and had she succeeded she would not have returned to M. She then went on a visit for one day to a friend in M., and the next day went into the workhouse at M. :—

Held, that she was irremoveable from M., as her temporary absence from M. did not amount to a break of residence.

UPON an appeal to the Middlesex Quarter Sessions by the guardians of the St. Ives Union, in the counties of Huntingdon and Cambridge, against an order, dated the 27th of December, 1870, for the removal of Mary Parnell from the parish of St. Matthew, Bethnal Green, to the St. Ives Union, as the place of her last legal settlement, the sessions dismissed the appeal, subject to the following case :—

The pauper was about seventy years of age, and was the widow of William Parnell. She and her husband lived in St. Matthew for about twenty-four years continuously until March, 1866. She then went into the workhouse in that parish, into which also the husband was received a few months afterwards. Both were from time to time discharged and received again, until the 23rd of December, 1868, when the husband was removed to York Lunatic Asylum, where he died in January, 1869. Until that time both remained continuously in the parish of St. Matthew, and after the removal of the husband to the asylum the pauper remained in the workhouse of St. Matthew until the 24th of October, 1870. She then went as a domestic servant into the service of the chaplain to the workhouse, who lived out of the workhouse, but in the same parish of St. Matthew. Before she went into his service she was sup-

1872

THE QUEEN
v.
ST. IVES.

plied with a stock of clothes by the officials of the workhouse. She was hired as a yearly servant in the ordinary way. She continued in the service for about six weeks, when, being too old for service, she left the chaplain, saying she wished at any rate first to have a holiday. Upon the day of leaving the chaplain she took all she possessed, consisting of her clothes only, with her, and went to visit her son who was living out of the parish, and stayed with him for three days. The son was a married man, had only one room, was very poor, and both he and his mother proved that she only went on a visit, with no intention of staying. Upon leaving the son she went on a visit, in the same way, to Mary Clarke, who also lived out of the parish, and there she stayed for three days. She then went for one day to a friend living in the parish of St. Matthew, and on the next day went into the workhouse of that parish, where she remained until the making of the order. Whilst out of the parish of St. Matthew she endeavoured to get employment, and had she succeeded in getting employment out of the parish she would not have returned to that parish. When the pauper left Mrs. Clarke she asked Mrs. Clarke to let her, the pauper, know if she should hear of any work to suit her, and said she was going back into the workhouse.

The respondents contend that a break in the residence was established by the pauper's absence from the parish during those two periods of three days each, inasmuch as it could not be said that she was constructively resident in St. Matthew, Bethnal Green, she having no home or residence in that parish, during such absence, to which she could return.

The appellants contend that there was no break, inasmuch as she did not leave with the intention of residing out of the parish, but simply to visit friends temporarily.

The question for the opinion of the Court was, whether there was a break in the residence or not.

Poland, for the respondents. The order of removal is rightly made, for the facts shew that there was a break of residence. It cannot be said that a person is constructively residing in a parish unless he has some dwelling-place in which he can reside. There must be both a place which he has a right to return to,

and an intention to return, to constitute a constructive residence:
Reg. v. Glossop. (1)

1872

 THE QUEEN
 v.
 ST. IVES.

[BLACKBURN, J. In *Guildford Union v. St. Olave's Union* (2) I explained what I said in *Reg. v. Glossop* (1), I never intended to say that having a residence to return to was necessary.]

In *Reg. v. Stourbridge* (3) which is to the same effect, Blackburn, J., is reported to have said, "There is no case in which a man has been held to have resided in a place where he had no residence or dwelling-place." Here the pauper went to reside out of the parish, first with her son and then with a friend, with the intention of permanently stopping away if she could get work, leaving no place in the parish to which she could return. Whether the absence is a long absence or a short absence is immaterial, it constitutes a break of residence.

[QUAIN, J. *Reg. v. St. Leonard, Shoreditch* (4), decides that in order to constitute residence it need not necessarily be in a house.]

That case was decided on the ground that the pauper was really never out of the parish. There it was held that the pauper continued to reside in the parish until it was shewn she resided elsewhere.

Metcalfe, for the appellants, was not heard.

BLACKBURN, J. The question is whether the pauper was residing in the parish of St. Matthew, and had become irremovable. She was not bodily present in the parish for six days in the year preceding the order for her removal. I think that when once a person is clearly shewn to be residing in a parish the onus is on the removing parish to shew that the residence has ceased. If the person has gone out of a parish, that is *primâ facie* evidence he does not reside in it, but this presumption can be rebutted. If an actual residence is abandoned, as if a dwelling-house is given up, that strengthens the presumption that the intention was to cease to reside; and, on the other hand, where the pauper retains a dwelling-house, that is evidence that he intends to return to the parish. But it is not conclusive evidence, it is only an important element in considering whether he intended to continue to reside

(1) Law Rep. 1 Q. B. 227.

(2) 25 L. T. (N.S.) 803.

(3) 34 L. J. (M.C.) 179.

(4) Law Rep. 1 Q. B. 21.

10 June 1879

1872
THE QUEEN
v.
ST. IVES.

or not. The real test is, does the person going out of the parish intend to stay away permanently, or is the absence from the parish merely a temporary absence? In *Reg. v. Glossop* (1), the intention of the pauper was to stay on in service as long as the mistress would keep her, and to return to the parish only if dismissed from service; in that case the inference to be drawn was an intention to stay away permanently; but in the present case, where the pauper left her service in the parish, and only went out of the parish on a visit, the inference is she was not residing out of the parish with the intention of staying away permanently. I think it monstrous to say that if a person went out of the parish to stay with a friend on a visit, that should amount to a break of residence. In the language I am reported to have used in *Reg. v. Glossop* (1), and *Reg. v. Stourbridge* (2), I never meant that the having a dwelling-house to return to was essential and necessary to shew an intention to return so as to prevent a break of residence. If I used that language—which very possibly I did—I did not accurately express what I meant, and what I understand to be the law. Whether a person has a house or not to return to, is only one element in considering the intention to return. In the present case there is enough to shew that the pauper had not ceased to reside in the parish.

HANNEN, J. The pauper on being discharged from service said, she would at any rate first have a few days' holiday, which I understand to mean before she went back into the workhouse, and she goes out of the parish for three days on a visit to her son, and for three days on a visit to a friend; such a staying out of the parish cannot constitute a break of residence.

QUAIN, J. I also think that this order of removal ought to be quashed on the ground that there was no break of residence, and the pauper was irremovable. Each case must depend on its particular circumstances. It would be a sad thing to hold that the facts stated in this case amounted to a break of residence; and it would be equally unfair to say that if a person went out of a parish to endeavour to get work, that would amount to a break of resi-

(1) Law Rep. 1 Q. B. 227.

(2) 34 L. J. (M.C.) 179.

10 June 1879

dence. The point is not only whether a person has left one parish, but whether he intended to reside permanently in another. 1872

Orders quashed.

THE QUEEN
v.
ST. IVES.

Attorneys for the Crown: *Neal & Philpot.*

Attorney for defendants: *W. T. Howard.*

THE QUEEN v. THE VICE-CHANCELLOR AND THE HEBDOMADAL
COUNCIL OF THE UNIVERSITY OF OXFORD.

May 7.

Corporation of Oxford—Resident—17 & 18 Vict. c. 81, ss. 16 & 48.

SECT. 16 of 17 & 18 Vict. c. 81, provides that the congregation of the University of Oxford shall be composed of the chancellor and certain other persons, and also of "all residents." SECT. 48 provides that the word "residents" shall mean and include all members of convocation who shall have resided twenty weeks within one mile and a half of Carfax during the year that shall expire on the 1st of September next preceding the making of the register.

E. was the vicar of F., which was distant nine miles from Oxford, and he resided at the parsonage house; but he rented a set of rooms within St. John's College (of which he was a resident fellow), which he had furnished, and for which he paid rent, and which were not occupied by any one else. When he visited Oxford, he sometimes slept there, but he generally returned to F. the same day:—

Held, that there must be an actual as distinguished from a constructive residence, and that E. was not a resident within the meaning of s. 48.

RULE calling upon the Vice-Chancellor and Hebdomadal Council of the University of Oxford to shew cause why a mandamus should not issue commanding them to place the name of J. H. Eld, B.D., on the register of the congregation of the university.

The applicant Eld claimed to be on the register of persons qualified to be members of the congregation for the University of Oxford, on the ground that he was a resident within the meaning of s. 48 of 17 & 18 Vict. c. 81.

It appeared from the affidavits that Eld was a Bachelor of Divinity of the University of Oxford and a Fellow of St. John's College, and he stated that he had for twenty weeks preceding the making and promulgation of the register resided within one mile and a half of Carfax, that is to say, he had during that period occupied, as a resident Fellow of St. John's College, a set of rooms

1872

THE QUEEN
v.
VICE-
CHANCELLOR
OF OXFORD.

consisting of a bed-room and a sitting-room, within that college and within a mile and a half of Carfax ; and that he was the sole occupier and tenant of such rooms, and that he paid rent for the same, and that the rooms were furnished by him and occupied by no one else. That whenever he slept in Oxford he slept in the bed-room, and that during the year last preceding the 1st of September last past, he had repeatedly slept, and had from time to time slept in the bed-room. It also appeared that on the 30th of October the Hebdomadal Council in revising the register of the members of the congregation had removed his name from the list of persons qualified by residence. It further appeared that Mr. Eld was the Vicar of Fyfield, in the county of Berks, and resided in the parsonage house, which was nine miles distant from Oxford : that he from time to time visited Oxford for college meetings and other purposes ; but that he generally on such occasions returned to his house at Fyfield on the afternoon or evening of the same day.

" *Manisty, Q.C.*, and *Kemplay, Q.C.*, shewed cause. By s. 16 of 17 & 18 Vict. c. 81, all members of convocation, being residents, shall be members of the congregation of Oxford, and the interpretation clause, s. 48, enacts that "residents" shall mean and include all members of convocation, who shall have resided for twenty weeks within one mile and a half of Carfax during the year that shall expire on the 1st of September next preceding the making and promulgation of the register as directed by s. 14 of the Act. By s. 14, the vice-chancellor shall, before the 25th of September in each year, make and promulgate a register of the persons qualified to be members of the congregation. By s. 15 the Hebdomadal Council shall revise the register. Under this section, in revising the register, the Hebdomadal Council have erased Mr. Eld's name. The legislature has given no appeal from their decision, it is therefore final, and this Court cannot review it.

[COCKBURN, C.J. That point is not arguable. This Court clearly has the power to review the decision of the Hebdomadal Council by mandamus.]

Mr. Eld is not a "resident" within s. 48, and is not entitled to have his name inserted on the register. The intention of the legisla-

ture was, that the congregation and the council should be composed of members of convocation, who were, as a fact, resident in Oxford, and therefore cognizant of the educational needs of the university. With that view s. 13 enacts that if any member of the council shall reside for less than twenty-four weeks during term time, in any year, his seat shall become vacant, and so with regard to the congregation, a "resident" is a member of congregation, who has resided twenty weeks at Oxford, that is, actually resided for one hundred and forty nights in a fixed abode at Oxford. Mr. Eld does not in that sense reside at Oxford, he resides at Fyfield.

Adams, Q.C., in support of the rule. Mr. Eld is a resident at Oxford. He has two residences. A man may reside in two places; he, no doubt, resides at Fyfield, but he also resides at Oxford. He has a set of rooms at Oxford, and he occasionally sleeps there; it is not necessary that he should continually sleep there, it is sufficient if it is not a colourable, but a bonâ fide residence: *Whithorn v. Thomas*. (1) If there is the power to reside, an actual, personal residence is not required.

[COCKBURN, C.J. The object of the legislature is to prevent the interests of the university—which are best understood by those who are on the spot—from being controlled by those who do not live there. "Resident" must therefore be construed strictly.]

This is a penal statute, it derogates from the rights of members of convocation. A constructive residence is sufficient.

[COCKBURN, C.J. No. It must be an actual residence. We must construe residence with reference to the obvious meaning of the word. Here residence is the essence of the qualification.]

In *Taylor v. St. Mary Abbott* (2), Bovill, C.J., says, if a man has two houses and lives at each when he pleases, "in such a case he would reside at both houses;" and Brett, J., in *Bond v. St. George, Hanover Square* (3), adopts a definition of residence from Elliot on Registration, 2nd ed. p. 204: "In order to constitute residence, a party must possess at least a sleeping apartment, but an uninterrupted abiding at such dwelling is not requisite, and absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return when-

(1) 7 M. & G. 1.

(2) Law Rep. 6 C. P. 309.

(3) Law Rep. 6 C. P. at p. 314.

1872

THE QUEEN
v.
VICE-
CHANCELLOR
OF OXFORD.

ever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence." The residence in this case is within the definition given of it in both those cases.

COCKBURN, C.J. I have nothing to add to what I have already said. It is clearly the intention of the legislature to distinguish between residents and non-residents, and that is a distinction well known. It is an actual as distinguished from a constructive residence that is required by this Act. The cases under the Registration Acts are not in point.

MELLOR, J. Under this statute the real qualification is actual residence, and the statute is not satisfied by a constructive residence.

[LUSH and QUAIN, JJ., concurred.

Rule discharged.

Attorneys for prosecution: *Wood, Street, & Hayter.*

Attorney for defendants: *J. Philpot.*

April 27.

BARNES, APPELLANT v. AKROYD AND OTHERS, RESPONDENTS.

Nuisances Removal Acts, 18 & 19 Vict. c. 121, s. 12; 23 & 24 Vict. c. 77, s. 13; 29 & 30 Vict. c. 90, s. 14—Black Smoke from Mill Chimney—Occupier of Premises—Liability of.

18 & 19 Vict. c. 121, s. 12, and 23 & 24 Vict. c. 77, s. 13, enact that upon complaint of a nuisance being made to a justice he shall "issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or, *if such person cannot be found or ascertained*, the owner or occupier of the premises on which the nuisance arises to appear before any two justices . . . who shall proceed to inquire into the said complaint, and if it be proved to their satisfaction that the nuisance exists, or . . . if removed or discontinued, that it is likely to recur or be repeated," they may make an order "on such person, owner, or occupier for the abatement" thereof.

The respondents were summoned for sending forth black smoke, on a certain day, from a chimney of premises belonging to them (not being the chimney of a private dwelling-house) in such quantity as to be a nuisance within 29 & 30 Vict. c. 90, s. 19, and the above statutes. At the hearing proof was given that black smoke issued from the chimney on the day named so as to be a nuisance, and that the premises were in the occupation of the respondents and used as a factory.

No evidence was adduced to shew that any inquiry had been made to find out who had charge of the furnaces causing the smoke at the time of the emission, and the justices, therefore, discharged the respondents :—

Held, that the respondents were properly summoned, as the persons by whose permission the nuisance arose, and were responsible as such, if the person causing the smoke to issue was their servant.

1872

BARNES

v.

AKROYD.

CASE stated under 20 & 21 Vict. c. 43, by Justices of the West Riding of Yorkshire.

The respondents were summoned upon an information laid by the appellant, an inhabitant of the parish of Halifax, which alleged as follows, viz., “for that they on the 16th day of December instant, at the township of Skircoat, unlawfully did send forth black smoke from a certain chimney belonging to certain premises there called Copley Mills, belonging to them (not being the chimney of a private dwelling-house), in such quantity as to be a nuisance contrary to the statute in such case made and provided.

At the hearing on the 30th of December last, it was proved on behalf of the appellant that he was an inhabitant of Sowerby Bridge, in the said parish of Halifax, being the parish within which the said mills called Copley Mills are situate, that black smoke did issue from the chimney of the said mills on the day in question at different intervals, for periods of time amounting together to seventeen minutes of the one hour during which it was watched, in such quantity as to be a nuisance, that Copley Mills were in the occupation of the respondents, and that the said premises were used as a manufactory and not as a private dwelling-house. No inquiry had been made as to who had charge of the furnaces at the time the smoke was emitted, or as to the description of furnaces in use at the time, nor had any order been theretofore made prohibiting the use of the said chimney.

No attempt was made to disprove the quantity of black smoke said to have been issuing from the mill chimney ; but on the part of the respondents it was contended that the charge could not be maintained against the respondents upon the evidence ; and that the justices ought, under s. 12 of 18 & 19 Vict. c. 121, to have issued a summons requiring the person by whose act, default, permission or sufferance the nuisance arose or continued, or if such person could not be found or ascertained, the owner or occupier of

1872
BARNES
v.
ABROYD.

the premises on which the nuisance arose to appear before them in petty sessions assembled at their usual place of meeting, and that they should then proceed to inquire into the said complaint. And that as there was no evidence to prove who was in charge of the furnaces which sent the black smoke up the chimney, the wrong person had been summoned, and that the occupier could not be charged with the offence of committing such a nuisance unless it had been first shewn that the stoker, engineer, or other person employed at the respondents' fireplaces or furnaces could not be found.

On the part of the appellant it was contended that, if the act or default was not the positive act or default of the respondents, yet it was undoubtedly with their permission or sufferance that the nuisance arose and continued, for they being the occupiers of the premises, no person, as long as they continued in such occupation, could do such acts without their permission or sufferance. And it was further argued that the respondents were responsible for the acts and defaults of their servants in this respect, and more particularly so as the proceeding was not for the recovery of penalties, but merely a civil proceeding against the respondents for an order for abatement of the nuisance referred to. (1)

Post 530

(1) 18 & 19 Vict. c. 121, s. 12 (The Nuisances Removal Act for England, 1855), enacts that upon complaint of a nuisance being made before a justice of the peace by the local authority, "such justice shall thereupon issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices in petty sessions, assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists, or did exist at the time when the notice was given, or if removed or discontinued since the notice was given,

that it is likely to recur or be repeated, the justices shall make an order in writing under their hands and seals on such person, owner or occupier, for the abatement or discontinuance and prohibition of the nuisance and payment of costs.

23 & 24 Vict. c. 77, s. 13, enables an inhabitant of the parish wherein a nuisance on any private premises exists to make such complaint, and empowers justices to act in relation thereto as in cases where complaint is made by a local authority under 18 & 19 Vict. c. 121, s. 12.

29 & 30 Vict. c. 90, s. 14, enacts that the expression "Nuisances Removal Acts" shall mean the Acts 18 & 19 Vict. c. 12, 23 & 24 Vict. c. 77, and that part two of this Act shall be construed as one with them; and

The justices therefore asked the opinion of the Court as to whether they ought, upon the evidence laid before them, to have made the order for abatement applied for. If the Court should be of opinion in the affirmative, the justices were ready to issue a fresh summons and hear the complaint *de novo*.

McIntyre, Q.C., for the appellant. Upon the facts proved the respondents should have been ordered to abate this nuisance. The smoke issued from a chimney on premises occupied by them, they suffered the nuisance to arise, and are responsible for the negligence of their servants, who may have directly caused it.

[BLACKBURN, J. *Qui facit per alium facit per se.*]

The Court then called on

F. M. White, for the respondents. The nuisance (if any) under 29 & 30 Vict. c. 90, s. 19, was the chimney itself, and not the mere emission of black smoke. But if the act of sending forth such smoke is within the meaning of s. 19, then "the person by whose act, default, permission, or sufferance the nuisance arises or continues" is he who mismanaged the furnaces in lighting the fire. And there is no evidence that he was, in this case, the servant of the respondents. He may possibly have been a stranger; and in the absence of proof that "such person cannot be found or ascertained," the "owner or occupier of the premises" cannot be subjected to an order under 18 & 19 Vict. c. 121, s. 12.

BLACKBURN, J. The magistrates were mistaken in their application of the law to the facts of this case, and in thinking that the "person by whose act, default, permission, or sufferance" the nuisance occurred can only be the person who may have actually caused the smoke to be sent forth. If they were satisfied that he was the servant of the respondents, then the latter were the persons who created the nuisance and are responsible for so doing. As, however, the smoke is not continuous, the justices stopped too soon in their investigation; for, after first ascertaining whether black smoke had been emitted from the chimney in such quantity as to

1872

BARNES
v.
AKROYD.

s. 19, that "the word 'Nuisances' under the 'Nuisances Removal Acts' shall include 'any chimney (not being the chimney of a private dwelling-house), sending forth black smoke in such quantity as to be a nuisance.'"

1872

BARNES
v.
AKROYD.

be a nuisance under 29 & 30 Vict. c. 90, s. 19, they should have proceeded further to inquire if such nuisance were "likely to recur or be repeated." This they can do on reconsidering the matter: for the question put to us must be answered in favour of the appellant.

MELLOR, J., concurred.

Judgment for the appellant accordingly. (1)

Attorneys for appellant: *Bower & Cotton.*

Attorneys for respondents: *Chester & Urquhart.*

April 24.

JENKIN AND DENNIS, APPELLANTS; KING, RESPONDENT.

Poaching Prevention Act (25 & 26 Vict. c. 114), s. 2—Evidence of having used a Net for taking Game.

The appellants were convicted, under 25 & 26 Vict. c. 114, s. 2, of having used a net for unlawfully taking game.

The evidence was that the two appellants were seen together by a policeman on the 16th of December on a highway, about half-past nine p.m. One had a net under his arm for catching hares. Nothing else was found on either of them; but they had a lurcher with them. The policeman had heard a dog yelping as if in chase of a hare or rabbit a little time before the defendants came along the road. The night was damp, and the net was wettish:—

Held, that there was evidence to support the conviction: for that it was not necessary that the appellants should have caught any game; it was sufficient if they had used the net for the purpose, though unsuccessfully, of which there was evidence.

CASE stated by Justices of Cornwall, under 20 & 21 Vict. c. 43.

The appellants were charged by an information of the respondent, one of the constables of the county police (2), for that they, being on a certain highway or public place, and with good cause

(1) See *Norris v. Barnes*, post p. 537, and the two following cases.

(2) Under 25 & 26 Vict. c. 114, s. 2, which enacts: "It shall be lawful for any constable or peace officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding

or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets, or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person; and should there be found any game or any such article or thing as

suspected of coming from lands where they had severally and respectively unlawfully been in search or pursuit of game, and aiding and abetting each other, had in their possession a certain net used for unlawfully killing and taking game; and the information prayed that they, Samuel Jenkin and Samuel Dennis, might be summoned to answer the information.

James King, the respondent, deposed: "I know defendants Jenkin and Dennis. The former is a mason and the latter a carpenter. On the 16th of December last, from information I received, I went on the highway between Altarnun village and the Rising Sun. I was going along the road with P. C. Cole. I heard a dog yelping at some distance—near half a mile. We stopped about to see what we could see. About half an hour after we met the defendants together on the highway. It was getting dark then. It had been good moonlight. It was about half-past nine. I had a lamp and opened it on them. I saw Dennis had a net (which I produce) under his arm. They were in their working dishabille. I charged them both with being out poaching. They denied it. I did not see any dog with them. I searched them both. The only thing found was the net. They did not say where they had been."

The other constable, Cole, deposed: "I was with King on this occasion. We heard a dog yelping. A little time after I saw defendants come along the road with a dog; a lurcher, half greyhound. The sergeant threw the light on them and took possession of a net which Dennis had under his arm. I said they had a dog. Jenkins denied it, and said the only dog he had was the little one. Jenkins took us home to his house, about 100 yards off, and shewed us a hole, and his little dog was inside. I told him he had a lurcher there some weeks, which he denied. A few minutes after

1872

 JENKIN
v.
KING.

aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace, assembled in petty sessions, as provided in 18 & 19 Vict. c. 126, s. 9, as far as regards England and Ireland, and before a sheriff or two justices of the peace in

Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding 5*l*., and shall forfeit such game, guns, parts of guns, nets and engines. . . ."

1872
JENKIN
v.
KING.

we saw the dog go into Dennis's house. He drove him out of his house, and he went through the hole into Jenkins's house. We told him we heard the dog yelping, evidently driving a rabbit or hare just before. Jenkins said it was not that dog. 'I've seen him drive a rabbit to-day, and he won't yelp at all.' Jenkins asked the sergeant several times to look the affair over and say nothing about it. There had been a mist. The net was wettish."

Cross-examined:—"I heard the men whistle to the dog just before we came to the men. The dog was before them. There is a difference between a dog yelping at a rabbit or at a sheep. It was a hare net."

The net was produced. It was a regular gate net for game, leaded at the corners.

It was contended on behalf of the appellants that there was no evidence that either of them had been upon any ground in search of game or for any other purpose, or that they had used the net for unlawfully taking game, or at all. Nor were they in possession of game. That it is not unlawful within the Poaching Prevention Act to be in possession of a dog. That there was no evidence that a dog of the defendants' was the dog which the policemen had previously heard yelping. Nor that either of the defendants knew that any dog had been upon any land for any purpose, nor was it shewn upon what land or whose land the yelping dog had been.

The justices, having heard the charge and defence, adjudged that each appellant should be fined 1*l.* with costs.

If the Court should be of opinion that, on the above evidence, the justices might infer that the appellants had used the net for unlawfully killing or taking game, the convictions were to remain against both or either as the Court should direct.

Pinder, for the appellants. There was no evidence on which the justices could properly find that the appellants had unlawfully used the net for killing or taking game. No game was found upon them, which distinguishes this case from the two cases which have been decided under the Act (25 & 26 Vict. c. 114, s. 2), *Brown v. Turner* (1), and *Evans v. Botterill* (2): in

(1) 13 C. B. (N.S.) 485; 32 L. J. (M.C.) 106.

(2) 3 B. & S. 787; 33 L. J. (M.C.) 50.

both of which game was found on some of the accused, as well as nets. Beyond the fact that this net was wet, there is nothing to lead to the inference that it had been used, even in the attempt to take game; assuming, however, that there was evidence of the attempt, that is not sufficient.

A. P. Stone, for the respondent. There was evidence of the use of the net in the attempt to take game. The net was wet and had therefore been stretched on the damp bushes, and the yelping of the dog shewed that a hare or rabbit had been started. It is a fallacy to say that, in order to make out the offence of using a net for taking or killing game, game must be taken or killed.

BLACKBURN, J. I think there was some evidence, though of course not conclusive, from which the justices might find that the appellants had used the net for taking or killing game; and it would, I think, have led me to the same conclusion. The facts on which I rest this conclusion are, that the appellants are found on the highway late in the evening, with a net for taking game, without any explanation being offered of where they had been; the reasonable conclusion from that was that they had been out for the purpose of taking game. The net is wettish, this was evidence from which to draw the conclusion that it had been spread on the damp grass and bushes; then a lurcher had been heard yelping, which is afterwards found to belong to one of the appellants. I must say that when two men are found under such circumstances accompanied by a dog, in the absence of any explanation on their part, there is *primâ facie* evidence that they had been trying to catch a hare or rabbit with the net and dog. I wish to say emphatically that persons may be convicted under this statute of having used a net or other thing for unlawfully killing or taking game, without having been successful in killing or taking any.

HANNEN and QUAIN, JJ., concurred.

Convictions affirmed.

Attorneys for appellants: *Cowdell, Grundy, & Browne*, for *R. & A. P. Peter, Launceston*.

Attorneys for respondent: *Bell, Steward, & Lloyd*.

1872

JENKIN
v.
KING.

1872
April 27.

SIMPKIN, APPELLANT; JUSTICES OF THE BOROUGH OF
BIRMINGHAM, RESPONDENTS.

*Alehouse—Licence for Sale of Exciseable Liquors—Change of Occupancy—Expi-
ration of Licence—Subsequent Removal—New Tenant—Application to
Special Sessions—9 Geo. 4, c. 61, ss. 4, 14.*

W., duly licensed under 9 Geo. 4, c. 61, applied at a general annual licensing meeting, on the 15th of September, for a renewal of his licence, which was refused. The licence expired upon the 10th of October following, and he then ceased to sell exciseable liquors, but continued in occupation of the house until the 13th of October; he then gave up possession to S., who, after giving the proper notices, applied at a special sessions for a new licence in respect of the premises, under s. 14. The justices refused the application, on the ground that, as W. was not licensed within the terms of the above section at the time of his removal from the house, they had no jurisdiction.

Held, that the decision of the justices was right.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

Charles Woodin, the tenant and occupier of a house and premises in the borough of Birmingham, victualler, was, under 9 Geo. 4, c. 61, intituled "An Act to regulate the granting of licences to keepers of inns, alehouses, and victualling houses in England," duly licensed to sell exciseable liquors by retail, to be drunk and consumed in the said house and premises, by virtue of a licence granted to him by the Commissioners of Inland Revenue, dated the 10th of October, 1870, for one year. The licence so granted to him expired on the 10th of October, 1871, by effluxion of time. While in the occupation of the same premises, under a similar licence, that is to say, on the 23rd of December, 1868, Woodin was convicted of haying, on Sunday, the 13th of the same month, opened his house for the sale of wines, spirits, &c., before half-past twelve in the afternoon, and fined. And also on the 2nd of December, 1870, he was convicted of having been guilty of a similar offence on Sunday, the 23rd of October. And at the hearing of the last-named charge, he, in the opinion of the magistrate, suborned a witness on his behalf to commit perjury, and was fined 5*l.* and costs.

Woodin, in due form of law, as provided by 9 Geo. 4, c. 61, s. 10, applied at the general annual licensing meeting for the

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borough of Birmingham, held on the 25th of August, 1871, for a renewal of his licence, which annual licensing meeting and application were adjourned until the 15th of September, 1871; when his application was refused by the magistrates.

1872
SIMPKIN
v.
JUSTICES OF
BIRMINGHAM.

He gave notice of appeal against the refusal under s. 27 of the Act; but such appeal was not prosecuted, and he continued to occupy the house and premises until the 13th of October, 1871, being three days after his licence expired, but he did not continue to sell exciseable liquors by retail under his licence after the expiration thereof on the 10th of October, 1871.

On the 30th of September, 1871, William Simpkin, the appellant, being then the new tenant or occupier, and in possession of the house and premises, duly gave the notice required by s. 14, alleging that Woodin, the person in the occupation of the house and premises, and duly licensed to sell exciseable liquors, to be drunk or consumed in such house and premises, having removed from and yielded up possession of such house and premises, it was the intention of him, the appellant, as the new tenant and occupier of the house and premises, to apply at the next special sessions for a licence to sell exciseable liquors, &c. (1)

1488
291
(1) 9 Geo. 4, c. 61, s. 4, enacts, That the justices assembled at the . . . general annual licensing meeting "shall appoint not less than four nor more than eight special sessions to be holden in the division or place for which each such meeting shall be holden in the year next ensuing such general annual licensing meeting, at periods as near as may be equally distant; at which special session it shall be lawful for the justices then and there assembled in the cases and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed to sell exciseable liquors

by retail, to be drunk or consumed on the premises."

Sect. 13 enacts, That every licence . . . shall be in force in Middlesex and Surrey from the 5th day of April, and elsewhere from the 10th day of October, after the granting thereof, for one whole year thence respectively ensuing, and no longer. . . .

Sect. 14 enacts, "That if any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall become bankrupt; . . . or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have

1872

SIMPKIN

v.
JUSTICES OF
BIRMINGHAM.

The appellant duly made an application in pursuance of the notice at the special session holden on the 11th of January, 1872, and such special session and application were adjourned until the 18th of January, when they were again adjourned until the 15th of February, when the application was refused on the ground that the magistrates at such special session were not authorized under s. 14 to entertain such application, because Woodin, having remained in possession of the house and premises until after the expiration of the licence (by effluxion of time) was not a person "so licensed" at the time of giving up possession. And that Simpin was not a new tenant or occupier within the meaning of the said section.

The appellant having given notice of appeal against this refusal, this case was stated.

H. Matthews, Q.C., for the appellant. The question is whether the words used in s. 14 of 9 Geo. 4, c. 61, make it necessary that an outgoing tenant of a public-house should remove before the expiration of his licence in order to entitle a new occupier to apply for a licence at special sessions: *The Queen v. Justices of Middlesex*. (1) There can be no difference between leaving the premises before or after the licence expires. The section does not require the former tenant to be licensed when he quits, for it mentions in the alternative the heirs, executors, administrators, and assigns of any person so licensed.

[BLACKBURN, J. The tenant having died "before the expiration of his licence." I do not think that part of the section is favourable to the appellant's argument.]

neglected to apply, at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house; . . . it shall be lawful for the justices assembled . . . at a special session, holden under the authority of this Act, for the division or place in which the house so kept or having been kept shall be situate, in any of the above-mentioned cases, and

in such cases only, to grant to the heirs, executors, or administrators of the person so dying . . . or to any new tenant, or occupier of any house having so become unoccupied . . . a licence; . . . Provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April, or the 10th day of October then next ensuing as the case may be."

(1) Law. Rep. 6 Q. B. 781.

The words in parenthesis “(before the expiration of such licence)” belong only to the first sentence, and cannot be imported into the whole section. It would be a hardship if a tenant, by allowing his licence to lapse while he remained in possession of the house, could deprive the landlord of the advantage resulting from the premises being used as an inn; for, unless an application might in such case be made at special sessions, no licence could be obtained until the general annual meeting. The refusal of the licence to Woodin was no bar to *Simpkin v. Justices of West Riding*. (1)

Field, Q.C., for the respondents. The scheme of the Act evidently is that the licence granted shall be merely personal to the holder, although it relates to particular premises. It remains in force for one year and no longer: s. 13. But during that period various contingencies may happen, the tenant may die, or become bankrupt, or may, to the injury of his landlord, neglect to apply for a renewal of his licence. Therefore provision is made for the granting of an interim licence to his successor in the occupancy of the house, enabling the latter to carry on the trade there until the next general annual licensing meeting. Nevertheless, it is a condition that the person yielding possession should be “duly licensed” when he does so. Here Woodin was not “so licensed” on his quitting the house. Justices at special sessions have no jurisdiction unless at the time of the application to them an unexpired licence, enabling the house to be then kept open as an inn, is in force. “So licensed” means “holding a licence,” and not “having been licensed,” as is contended for the appellant. In *Reg. v. Justices of Middlesex* (2) the present point was not raised; but there the former occupant of the beerhouse was licensed when he gave up possession.

Mathews, Q.C., in reply.

BLACKBURN, J. I think that the sessions were right, and that the applicant came neither within the words nor the spirit of the statute. Under 9 Geo. 4, c. 61, ss. 1 and 13, the justices at the general annual meeting may grant a licence for a year; and s. 4 enacts that special sessions shall be holden at which the justices

1872

SIMPKIN

v.

JUSTICES OF
BIRMINGHAM.

(1) Law Rep. 5 Q. B. 33.

(2) Law Rep. 6 Q. B. 781.

1872
SIMPKIN
v.
JUSTICES OF
BIRMINGHAM.

may license "persons intending to keep inns theretofore kept by other persons being about to remove from such inns." The language there used seems rather to indicate that the legislature contemplated an application made by an incoming tenant before the licensed occupier had actually quitted the premises. But s. 14 provides, *inter alia*, for the case where "any person duly licensed shall (before the expiration of such licence) die. . . ." Those words would clearly apply when a person licensed in August, 1870, failed to get a licence in August, 1871, but died before the 10th of October, 1871, and his heirs, &c., would then be in a position to apply for what he himself could not obtain, and might go to special sessions. Parliament probably meant to meet such a contingency. The section goes on, "or if any person so licensed shall remove from or yield up possession of the house. . . ." To my mind, the idea of those who framed the statute was to enact merely that where the keeper of a public-house yielded up possession prior to the general meeting in August, but, nevertheless, not so long before as to allow a new occupier time for giving the notices necessary to found an application to that meeting, the incoming tenant might go to special sessions for a licence; the terms of the section are, however, certainly applicable to a removal *after* the annual meeting although *before* the 10th of October. But can we extend them to the case where the outgoing tenant does not quit the house until after the expiration of his licence? I am of opinion that we cannot. If we were to do so we should be disregarding the Act, for he would *not* be licensed at the time of leaving the premises. The section, indeed, upon my construction of it, operates more favourably to the succeeding tenant than was, perhaps, originally intended: for I think it applies if a man removes after he has failed to get a new licence, so long as the departure is before his existing licence expires.

MELLOR, J., concurred.

Judgment for the respondents. (1)

Attorneys for appellants: *Wilkins, Blyth, & Marsland.*

Attorneys for respondents: *Robinson & Preston.*

(1) See the next two cases.

THE QUEEN ON THE PROSECUTION OF JUSTICES OF MIDDLESEX,
RESPONDENTS *v.* TAYLOR, APPELLANT.

1872

May 7.

Alehouse—Licence for Sale of Exciseable Liquors—New Tenant—Application to Special Sessions after Refusal by General Sessions—9 Geo. 4, c. 61, s. 14.

*Book 462
Page 1492*

A house in Middlesex having been licensed for some years under 9 Geo. 4, c. 61, L., the licensed tenant, gave up possession on the 6th of February to T. At the adjourned general annual licensing meeting on the 24th of March, application for a licence was made on behalf of T. This was refused, and no appeal was made under s. 27. The licence having expired on the 5th of April, the house was shut up. On the 4th of May, T. applied under s. 14 to the special sessions, who refused the licences on the ground that the renewal of the licence had been refused at the general meeting. T. again applied on the 4th of July, to the special sessions, under s. 14; and the justices refused a licence on the ground that the case was not within s. 14. On appeal the general sessions refused on the same ground.

Held, that, having applied to the general licensing meeting and been refused, T. could not afterwards go to the special sessions.

On appeal against the refusal of Justices of Middlesex to grant C. C. Taylor a licence for a house in Kensington under s. 14 of 9 Geo. 4, c. 61, the general sessions, on the 19th of August, 1871, dismissed the appeal subject to a case.

The Abbey Tavern had been licensed for some years under 9 Geo. 4, c. 61, and on the 5th of July, 1870, the tenant duly transferred the licence to Charles Landen. While Landen occupied the house he was guilty of gross acts of impropriety, and he gave up possession to the appellant on the 6th of February, 1871. On the 7th of February Landen applied to justices to transfer the licence to the appellant who had previously purchased the house and goodwill, when the application was refused. At the adjourned general annual licensing meeting on the 24th of March, 1871, application for a licence was made by Landen, who had given up possession to the appellant, who was then in occupation; no notice had been given by the appellant of intention on his part to make the application, but the application was made on his behalf and with his assent. This application was refused, and no appeal was made to the sessions pursuant to s. 27.

The licence having expired on the 5th of April, 1871, the house

1872
THE QUEEN
v.
TAYLOR.

was shut up. At the next special licensing session after that day, viz., on the 4th of May, 1871, the appellant, who was then in occupation, applied to the justices to grant him a licence, under s. 14. (1) The justices refused to grant the licence upon the ground that the renewal of the licence had been refused at the previous adjourned general annual licensing meeting, and no appeal had been made.

A fresh application under the same section was made by the appellant, after giving the required notices, at the next following special licensing sessions on the 4th of July. The justices, after hearing the case, refused to grant a licence, on the ground that the case did not come within s. 14.

On appeal, the general sessions, after hearing, refused to grant a licence, on the same ground, and dismissed the appeal accordingly.

The house had been properly conducted, except during the tenancy of Landen, and the appellant is a fit and proper person to be entrusted with a licence, and it is conceded that he was entitled to have a licence granted to him, if the justices had power to grant it under s. 14. The house is a suitable house, and a licence to it would be a convenience to the neighbourhood.

The question for the Court was whether the special sessions or the general sessions had power to grant a licence to the appellant under s. 14.

May 1. *Bosanquet*, for the respondents, contended that the justices at special sessions had no power to grant a licence under s. 14 of 9 Geo. 4, c. 61, as the case was not brought within any of the conditions of that section. Secondly, if the justices had *prima facie* jurisdiction the matter was *res judicata*; the licence having been refused at the general licensing sessions, it was not open to the appellant to go to the special sessions; he might have appealed to the quarter sessions.

McMahon, for the appellant, contended that the refusal at the general licensing sessions was not on the merits, and was therefore no bar to a subsequent application to the special sessions. Secondly, the case was within s. 14, one of the cases provided for by that section being where the outgoing tenant has failed to

(1) See the section set out, ante, p. 483, note (1).

procure a renewal of the licence: see *Bryant v. Beattie* (1), and the judgment of Tindal, C.J.

The Court adjourned the case for the appellant to produce an affidavit, if possible, that the refusal of the general licensing meeting was not upon the merits.

May 7. BLACKBURN, J. A licensing case was argued, before my Brothers Mellor and Lush and myself, a few days since. The material facts were that the former tenant of the public-house had removed, and the incoming tenant applied for a licence under s. 14 of 9 Geo. 4, c. 61 to special sessions. But it appeared that the old tenant having removed, the new tenant had applied to the general licensing sessions held in the previous March, and for some reason unexplained the justices refused the licence. He did not appeal to quarter sessions, but afterwards went to special sessions, in the same year, and asked for a licence. One point raised was, whether, having applied at the general licensing meeting and been refused, he could go to the special sessions. We are of opinion that he could not; that the refusal, not having been appealed against, must be taken exactly as if it had been appealed against and affirmed, and that, after that, the appellant cannot go to special sessions. Mr. McMahon said, indeed, that there was no decision on the merits; but it is not so stated in the case, and if affidavits could have been made to that effect they might have been obtained. We think that the appellant may go to any future general annual meeting and make an application for a licence, but he cannot get it at special sessions.

Orders confirmed. (2)

Attorneys for appellant: *H. J. & T. Child.*

Attorneys for respondents: *Allen & Sons.*

(1) 4 Bing. N. C. 254, 262.

(2) See the preceding and the next case.

1872

June 10.*

THE QUEEN ON THE PROSECUTION OF JUSTICES OF NORFOLK,
RESPONDENTS *v.* ROWELL, APPELLANT.

Alehouse—Licence for Sale of Exciseable Liquors—9 Geo. 4, c. 61, s. 14—Change of Tenant—Discretion of Justices—Jurisdiction of Special Sessions.

Ante 402
— 409
74 BD 523
524
G., the occupier of a house, licensed under 9 Geo. 4, c. 61, having been fined for an offence against the tenor of his licence, was ejected by his landlord on the 17th of May. In June, H. was let into possession, and on the 5th of June the petty sessions refused to indorse G.'s licence to H., under 5 & 6 Vict. c. 44. H. then gave up possession, and at the general licensing meeting on the 4th of September the house was unoccupied, and no application was made for a licence. The appellant afterwards became tenant, and applied at the special sessions on the 20th of November for a new licence under s. 14; but after hearing the case on the merits the justices refused to grant a new licence. On appeal, the quarter sessions, finding the appellant to be a proper person, dismissed the appeal on the ground that the granting or refusing of such new licence was within the discretion of the justices at special sessions:—

Held, that the justices had a discretion to grant or refuse the licence.

Quære, whether under the circumstances the special sessions had any jurisdiction.

ON appeal against the refusal of Justices of the county of Norfolk to grant an alehouse licence to William Rowell, the tenant of a certain house called the "Marshland Inn," under s. 14 of 9 Geo. 4, c. 61, the quarter sessions dismissed the appeal, subject to the following case.

All formal notices were admitted to have been given.

The Marshland Inn is a house let for a term of years to Messrs. Eyre & Co., brewers, of King's Lynn. In September, 1870, W. Gregory was tenant under Messrs. Eyre, and at the annual general licensing meeting held in that month he obtained a licence for the sale of exciseable liquors, under 9 Geo. 4, c. 61. In April, 1871, Gregory was fined by the magistrates for an offence against the tenor of his licence. On the 15th of May following Messrs. Eyre, having given Gregory notice to quit, and Gregory's interest therein having been duly determined thereby, and Gregory, notwithstanding, having refused to deliver up possession, obtained from the magistrates a warrant in ejectment under 1 & 2 Vict.

* Decided in Trinity Term, but reported here with the two preceding cases for convenience of reference.

c. 74, s. 1 for the redelivery of the house to them. On the 17th of May, Gregory went out of the house under threat of eviction under the above-mentioned warrant, which was not therefore put in force, and Messrs. Eyre thereupon resumed possession.

At the beginning of June, 1871, one Huckle was let into possession by Messrs. Eyre, as their tenant, and on the 5th of that month he applied to the justices in petty sessions under 5 & 6 Vict. c. 44, to endorse Gregory's licence to him, but they refused to do so. Huckle soon after gave up the house to Messrs. Eyre, and at the annual general licensing meeting held on the 4th of September, 1871, the house was unoccupied and no application was made for a licence in respect of it.

On the 20th of November, 1871, a special session was held under 9 Geo. 4, c. 61, s. 4, and the appellant, who had become tenant of the house since the licensing meeting of the 4th of September, applied to the special sessions for a new licence under s. 14, but the magistrates, after hearing the appellant's counsel, and considering the application on its merits, refused to grant a new licence to the appellant in respect of such house. Against this refusal the present appeal was made to the quarter sessions.

It was contended on the part of the appellant, and denied on the part of the respondents, that the magistrates at such special session had no discretion, but were bound under 9 Geo. 4, c. 61, s. 14 (1), and 34 & 35 Vict. c. 88, s. 1, to grant the appellant the licence that he asked for.

The quarter sessions held that, although Gregory was a person duly licensed under 9 Geo. 4, c. 61, and removed from or yielded up possession of the house specified in his licence at a period before the general annual licensing meeting, and though it would have been lawful for the justices at a petty session to grant a licence to a new tenant or occupier of such house under s. 14 of that statute, yet that such licence so granted would have been a new licence, and that the granting or refusing of such new licence was within the discretion of the magistrates at the special session, and therefore the appeal was dismissed.

If the Court should be of opinion that it was discretionary with the magistrates assembled at the special session on the 20th of

1872

 THE QUEEN
v.
ROWELL.

(1) See the section set out, ante, p. 483, note (1).

1872
THE QUEEN
v.
ROWELL.

November to grant or refuse the new licence to the appellant (a proper person) under the above circumstances, then the judgment of the quarter sessions was to stand confirmed.

Blotfeld, for the respondents, contended that the case was not within s. 14, and that the justices at special sessions had no jurisdiction to grant a new licence, and he referred to the two previous cases (1); but assuming they had jurisdiction, they had a discretion, and were not bound to grant a new licence. The fitness of the appellant is admitted, but the justices had a right to consider the fitness of the house and the wants of the neighbourhood, &c. Sects. 4 and 14 must be read together; and s. 9 shews that justices have a discretion in every case. Even in the case of a transfer of the licence under 5 & 6 Vict. c. 44, the justices have a discretion. This point in effect is determined by the judgment of the Court in *Reg. v. Lancashire Justices*. (2)

No counsel appeared for the appellant. The Court intimated that it was unnecessary to argue the other point.

BLACKBURN, J. As far as we can see, without having the assistance of counsel for the appellant, there is nothing whatever in the Act to make it obligatory on the justices at special sessions to grant a licence. It is quite unnecessary, therefore, to consider whether the justices at special sessions had jurisdiction. The appeal was rightly dismissed, and the order of sessions must be affirmed.

MELLOR, J., concurred.

LUSH, J. I do not feel the least doubt that the justices had a discretion to refuse the licence. Whether they had jurisdiction is to my mind the only question admitting of any doubt. I may observe that s. 14 prohibits the granting of a licence at the special sessions in any cases except those enumerated.

Order of sessions confirmed. (3)

Attorneys for appellant: *Purkis & Perry*.

Attorney for respondents: *Wilkin*.

(1) Ante, pp. 487.

(2) Law Rep. 6 Q. B. 97.

(3) See the two preceding cases.

MORGAN v. ROWLANDS AND ANOTHER, EXECUTORS.

1872

May 7.

Statute of Limitations (21 Jac. 1, c. 16, s. 3)—*Part Payment—Interest paid under Compulsion of Law—Res Judicata—Principal and Interest.*

Defendants were the executors of the maker of a promissory note, made more than six years before action, by which he promised to pay plaintiff on demand 32*l.*, with interest thereon, at the rate of 5*l.* per cent. Within six years before action, plaintiff had sued defendants for interest upon the note, and defendants defended the suit; plaintiff recovered judgment for the interest claimed, and defendants thereupon paid the amount recovered:—

Held, that this payment of interest, not being such that a promise to pay the principal could be inferred in fact from it, was not sufficient to take the principal debt out of the operation of the Statute of Limitations:—

Semble, per Blackburn, J., that the recovery of the interest in the first action was no bar to a second action being brought for the principal.

DECLARATION against the defendants as executors of Isaac Rowlands, deceased, for that Isaac Rowlands on the 14th of April, 1856, by his promissory note, promised to pay plaintiff on demand 32*l.*, with interest thereon at the rate of 5*l.* per cent. per annum, but did not pay the same; and the same being due and unpaid, defendants, in consideration thereof, as executors, after the death of Isaac Rowlands, promised plaintiff to pay the same, but did not pay it.

Second plea: That defendants did not promise as alleged.

Fifth plea: That the cause of action did not accrue within six years.

Seventh plea: That plaintiff in the county court of Cardigan-shire levied a plaint against defendants for the same causes of action as in the declaration mentioned, except so much as relates to the promise alleged to be made after the death of Isaac Rowlands, and by the judgment of the court recovered a sum of 4*l.* 4*s.* 6*d.*, which sum was paid into court in satisfaction of the judgment.

Joinder of issue.

New assignment to seventh plea that plaintiff sued for other causes of action than those for which judgment had been recovered.

1872

MORGAN

v.

ROWLANDS.

Plea to new assignment: That defendants did not promise as alleged. Joinder of issue.

The writ in this action was issued on the 20th of August, 1870. After issue joined an order was made, under 19 & 20 Vict. c. 108, s. 26, that the cause should be tried in the county court of Cardiganshire, holden at Aberystwith.

At the trial in that court, on the 16th of January, 1872, before the learned judge of the court and a jury, no witnesses were examined on either side. The only evidence adduced was the production of the promissory note of the 14th of April, 1856, for 32*l.* set out in the declaration, the signature to which was admitted by defendants; and of the proceedings in the county court mentioned in the seventh plea. From those proceedings it appeared that on the 1st of October, 1868, plaintiff sued defendants in the Aberystwith County Court for 3*l.* 4*s.*, which plaintiff claimed for two years' interest due on the 14th of April, 1868, on the promissory note now sued upon. The defendants gave notice of special defence under the Statute of Limitations. At the trial on the 21st of October, 1868, defendants accordingly relied upon the statute. The plaintiff then alleged, in answer to the statute, payment to him on the 4th of February, 1863, of a sum of money on account of interest by Isaac Rowlands, defendants' testator, who had died on the 16th of December, 1863. This defendants denied. The Court gave judgment for plaintiff for 3*l.* 4*s.* interest and 1*l.* 0*s.* 6*d.* costs, making together 4*l.* 4*s.* 6*d.*, which sum defendants paid into court on the 29th of October, 1868.

Upon this evidence the learned judge put to the jury the question, whether the payment of the 3*l.* 4*s.* made by defendants under the above circumstances, was a payment on account of the interest upon the promissory note; to which question the jury replied in the affirmative.

Two questions were raised before the learned judge: first, whether the payment of 3*l.* 4*s.* for interest made in the former action in the county court was sufficient to take the case out of the Statute of Limitations; and, secondly, whether the recovery of the 3*l.* 4*s.* for interest, the principal sum being then due, was a bar to a second action for the principal sum. The learned judge directed a verdict for the plaintiff for 36*l.* 5*s.* 2*d.*

A rule having been obtained for a new trial, on the ground of misdirection, in directing a verdict for plaintiff on the second, fifth, and seventh pleas,

1872

MORGAN

v.

[ROWLANDS.

Lumley Smith shewed cause. (1) He proceeded to argue that the prior recovery of interest was not a bar to a second action for the principal sum.

Bosanquet was called upon to support the rule. First, the recovery in the former action is a bar to the present action. Wherever there is one promise and one default, a recovery of anything in respect of it is final, and no second action can be brought; for the law does not allow a man to split his demand, and bring two actions instead of one. The test is, whether the whole demand could be properly included in one count; and there can be no doubt that principal and interest may be. In *Hollis v. Palmer* (2) Tindal, C.J., says: "Two objections have been made. First, that with reference to the mode of statement in the declaration, the plea admits interest to be due; and that in all cases in which interest has been paid within six years the party may sue for the amount of interest remaining unpaid; that is, that you may sever the contract to pay interest from the contract to pay the principal. Perhaps in cases where there is an express promise to pay interest independently of the principal, there might be ground for such an argument; but in ordinary cases, interest has always been deemed a mere accessory of the loan, and when the demand for principal is barred the accessory falls along with it." *Siddall v. Rawcliffe* (3) is an authority to shew that there cannot, under any circumstances, be two recoveries upon a note in which the promise is on the face of it a single promise. The principle is explained by Wigram, V.C., in *Henderson v. Henderson* (4), "Where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been

(1) In the Bail Court, before Blackburn and Hannen, JJ.

(2) 2 Bing. (N.C.) at p. 716.

(3) 1 Cr. & M. 487.

(4) 3 Hare, at p. 115.

1872
MORGAN
v.
ROWLANDS.

brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertance, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." The same principle is laid down and acted upon in *Nelson v. Couch* (1), and *Barnsley v. Taylor* (2). [He cited also *King v. Hoare* (3); *Taylor on Evidence*, 5th ed. s. 1513, p. 1460; *Miller v. Covert*. (4)] Secondly, there is nothing to take the case out of the operation of the Statute of Limitations. A different view prevailed in some of the earlier cases; but since the case of *Tanner v. Smart* (5) it has always been held that an acknowledgment, or part payment, to defeat the statute, must be such that a promise to pay the remaining debt may properly be inferred from it: *Tippets v. Heane* (6); *Tulloch v. Dunn* (7); *Wainman v. Kynman* (8); *Davies v. Edwards*. (9)

Lumley Smith was heard upon the second point. It is true that part payment, to defeat the Statute of Limitations, must be such that a promise to pay the remaining debt may be implied. But where a duty is proved the law implies a promise to perform it. Accordingly, an absolute and unconditional acknowledgment is sufficient to bar the statute. And as interest necessarily involves principal, the payment of interest is necessarily an acknowledgment of the principal debt, from which a promise to pay may be inferred in law. [He cited *Bamfield v. Tupper*. (10)]

BLACKBURN, J. It is only necessary for us to decide the last point. But I do not think there is the least foundation for the defendants' contention upon the other point. I do not think that a man, who has a debt bearing interest, by suing for the interest,

(1) 15 C. B. (N.S.) 99; 33 L. J. (C.P.) 46. *10th Ed. 306*

(2) 37 L. J. (Q.B.) 39.

(3) 13 M. & W. 494, 504.

(4) 1 Wend. 487.

(5) 6 B. & C. 603.

(6) 1 C. M. & R. 252.

(7) Ry. & Moo. 416.

(8) 1 Ex. 118; 16 L. J. (Ex.) 232.

(9) 7 Ex. 22; 21 L. J. (Ex.) 4.

(10) 7 Ex. 27.

interferes with his right afterwards to sue for and recover the principal. But it is not necessary to decide this question, because upon the second point the defendants are clearly entitled to succeed.

1872

MORGAN
v.
ROWLANDS.

When we look at the history of the law as to the effect of an acknowledgment, or part payment, to defeat the Statute of Limitations, we find that from the earliest times, in the case of an express acknowledgment of a debt barred by the statute, it was regarded as a new promise; and, by rather a subtlety of the pleaders, it was considered to be a promise laid in the declaration, and a cause of action sued for by the declaration. And hence the rule that such an acknowledgment need not be specially replied, but may be proved under a denial of the plea of the statute. Many cases, it is true, were decided upon a different view of the effect of an acknowledgment, viz., that the effect was simply to negative the presumption of payment arising from the lapse of six years; and those decisions are inconsistent with the doctrine that I have referred to. But in *Tanner v. Smart* (1) it was decided that, however clearly an acknowledgment may negative any presumption of the payment of a debt, it does not take the case out of the operation of the statute, unless there be a promise in fact—an express promise to pay, or an acknowledgment such that a promise to pay may be inferred in fact. And in *Mitchell's Case* (2) Mellish, L.J., cites the following passage from Jervis's New Rules, p. 350, n. (a): "Before this statute (that is, 9 Geo. 4, c. 14) not only a verbal promise to pay a debt more than six years old, but a bare unconditional acknowledgment of its subsistence, made within six years before action brought, had been held sufficient to take the case out of the statute 21 Jac. 1, c. 16, s. 3. But now, in order to revive the liability of the debtor after the expiration of the six years, by subsequent acknowledgment or promise, there must be a proof of some writing, signed by himself, either containing an express promise to pay the debt, or being in terms from which an unconditional promise to pay it is necessarily to be implied. If, therefore, the writer, although he admits the existence of a debt, refuses to pay it, or reserves the matter for future consideration, or refers the creditor to some

(1) 6 B. & C. 603.

(2) Law Rep. 6 Ch. App. at p. 828.

1872
MORGAN
v.
ROWLANDS.

third person for payment, or the like, this will not be sufficient to prevent the operation of the statute." And the Lord Justice goes on to say: "That being the rule, there must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." Where, therefore, a promise or acknowledgment is relied on, the law is quite clear. The only further question is as to the effect of a part payment, or payment of interest; whether it must take place under such circumstances that a promise to pay may be inferred in fact. The principle laid down in *Tanner v. Smart* (1), as to an acknowledgment, has been applied in all the cases upon part payment, particularly in *Foster v. Dauber* (2) and *Davies v. Edwards* (3), namely, that it must be such that a promise may be inferred in fact not merely implied in law.

In the present case the defendants appear to have resisted the payment of interest to the last; the county court judge decided against them; and in obedience to the judgment they paid. It is impossible to say that from such a payment any promise to pay the principal can be in fact inferred. If there were any ground for saying that a promise in law was sufficient, the result might be different. But I think a promise in fact is clearly necessary.

HANNEN, J. I am of the same opinion. I say nothing as to the first point, for it is not necessary to do so.

As to the other point, I can see no distinction between payment of interest and part payment of principal. And I think it is clear that a part payment is not sufficient to take a debt out of the Statute of Limitations, unless it be such that a jury might fairly infer a promise to pay the remainder. No doubt very slight circumstances might be sufficient to support such an inference where there is a legal duty to pay. But where there are no such circumstances, but, on the contrary, all the facts go to negative any

(1) 6 B. & C. 603. (2) 6 Ex. 839; 20 L. J. (Ex.) 385

(3) 7 Ex. 22; 21 L. J. (Ex.) 14.

inference of a promise, the jury could not properly find one. And in the present case there is an entire absence of any circumstances indicating any intention to pay. The defendants always denied their liability; but at last they said, at most, "We will pay what we are compelled to pay." I can see nothing in that from which any acknowledgment of a larger sum due, or any promise to pay it, could be inferred.

Rule absolute.

Attorney for plaintiff: *R. D. Hughes, for J. H. Ravenhill, Aberystwith.*

Attorney for defendant: *E. Balden, for J. J. Attwood, Aberystwith.*

Considered. In re
DEBTOR, NO. 21 OF
1950 (No. 2)
[1951] 1 CH. 612

MERCER v. GRAVES.

Applied. JAMES BIBBY
LD. v. WOODS.
[1949] 2 K. B. 449

April 26.

Attorney and Client—Attorney's Lien for Costs—Set-off of Judgments.

Declaration on orders having the force of judgments of nonsuit, in suits which defendant had brought against plaintiff in Ireland. Plea of set-off on judgments recovered by defendant against plaintiff in Ireland. Replication on equitable grounds, that defendant ought not to be allowed to set off against plaintiff's claim the amount mentioned in the plea, because plaintiff retained one C. as his attorney to conduct his defence in the suits in the declaration mentioned, and plaintiff owes him the full amount of the costs, and C. has a lien upon the orders, and the amounts are therefore due from defendant to plaintiff as trustee for C., and plaintiff sues as such trustee. On demurrer:—

Held, that the replication was bad: for that the fact, that an attorney had obtained a judgment for a client, and that costs were due to the attorney, did not raise the relation of trustee and cestui que trust between the client and the attorney with respect to the proceeds of such judgment; and the so-called lien of the attorney is merely a claim to the protection of the Court as to his costs when the equitable interference of the Court is asked for the purpose of setting off one judgment against another.

Ex parte Cleland (Law Rep. 2 Ch. App. 808) commented upon.

DECLARATION, that in a suit depending in the Court of Queen's Bench in Ireland, at the suit of the now defendant against the now plaintiff, it was ordered by the said Court that the now plaintiff should be dismissed and that the now defendant should pay to the now plaintiff his costs of the said suit, being the sum of 14l. 7s. 3d. And by the provisions of s. 106 of the Common Law Procedure Amendment Act (Ireland), 1853 (16 & 17 Vict.

1872

MORGAN
v.
ROWLANDS.

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1872 c. 113), the said order was in lieu of, and had the effect of, a
MERCER judgment as in case of a nonsuit in the said suit. Averment of
v. all conditions precedent.
GRAVES.

The declaration contained nine other similar counts.

Plea, that the plaintiff at the commencement of this suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim upon judgments recovered by the now defendant against the now plaintiff in divers of the superior courts of common law in Ireland, for and in respect of causes of action over which the said Courts had jurisdiction, and for costs of suit, which said judgments still remain in force and unsatisfied; and for money found to be due from the plaintiff to the defendant on accounts stated between them; which amount the defendant is willing to set off against the plaintiff's claim.

Replication, on equitable grounds, that the defendant ought not to be allowed to set off against the plaintiff's claim the amount mentioned in the plea, because the plaintiff retained one Daniel O'Callaghan, as and being an attorney of the Courts of Queen's Bench and Exchequer in Ireland, to conduct the plaintiff's defence to the suits in the declaration mentioned. And O'Callaghan did accordingly conduct the plaintiff's defence to the suits. And the sums ordered to be paid by the defendant to the plaintiff, as in the declaration mentioned, were for the costs incurred by and on behalf of the plaintiff in the suits respectively, and not otherwise. And the whole of the costs are due from the plaintiff to O'Callaghan, and unpaid. And O'Callaghan has always had, and has, as such attorney as aforesaid, a lien upon the said orders and the sums payable thereunder, and a right to demand and receive such sums from the defendant in the plaintiff's name, and to retain the same for his own use. And by reason of the premises, the said sums became, and were, and have always been, due from the defendant to the plaintiff as a trustee for O'Callaghan, and not otherwise. And the plaintiff never had any beneficial interest in the said sums, or any of them, or any part thereof, and all things were done and happened to entitle the plaintiff to maintain this action as a trustee for O'Callaghan, and this action was commenced, and is prosecuted in the name of the plaintiff as a trustee for O'Callaghan, at his request, and for his sole use and benefit,

and not otherwise, and the set-off claimed by the defendant ought not to be allowed to the prejudice of O'Callaghan's lien, and claim for costs as aforesaid.

Demurrer and joinder.

1872.

MERCER
v.
GRAVES.

J. Brown, Q.C. (Beresford with him), in support of the demurrer. The defendant has a right, under the statute of 2 Geo. 2, c. 22, to set off his judgments against the claim of the plaintiff. The rule 63, Hil. T., 1853, which orders that "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought," . . . has no application to the pleading of a set-off under the statute of Geo. 2. It is a mere repetition of rule 93, Hil. T., 2 Wm. 4, and refers merely to the equitable jurisdiction of the courts when execution is taken out and there are cross judgments. The practice of the Queen's Bench had been to protect the attorney's lien; the Common Pleas holding that the equities between the parties overrode the lien; and the rule was originally made to assimilate the practice of all the courts to that of the Queen's Bench: see 1, Tidd's Practice, pp. 337-9. In 1 Chit. Archb. Practice, pp. 139, 140 (12th ed.), all the cases on the subject are collected, and it is shewn that what is called the attorney's lien upon a judgment is a mere right to the protection of the Court as to his costs where the equitable interference of the Court is asked to set off one judgment against another, but there is no such equitable right in the attorney to the proceeds of a judgment as can override the legal right of a defendant to plead a set-off when an action is brought on a judgment.

The Court then called upon

O'Malley, Q.C. (Lumley Smith with him), for the plaintiff. The proceeding by action is the only means there is of recovering these costs for the plaintiff's attorney. These orders, under s. 106 of the Irish Common Law Procedure Act, though in the nature of judgments, are held by the officers of the Irish courts not to be judgments within 31 & 32 Vict. c. 54, s. 1; and they refuse to give certificates, so that the plaintiff could not proceed by execution in this country. The replication shews that the whole amount of costs is due to the plaintiff's attorney; consequently the plaintiff is suing as trustee. The defence of set-off has always been

1872
 MERCER
 v.
 GRAVES.

treated as an equitable defence, and the equities of all parties are looked to. Thus in *Forster v. Wilson* (1), an action by the assignees of bankrupt bankers, it was held that the defendants could not set off the amount of cheques which they held as trustees for others, though they could set off the cheques of which they were the holders for good consideration. So in *Bristowe v. Needham* (2) it was held that one judgment could not be set off against another when one was recovered as trustee only.

[LUSH, J. What equity is there against the defendant setting up his legal right of set-off in this case?]

The lien of the attorney is well known to the law, and the defendant must be taken to have notice of it.

[BLACKBURN, J., referred to *Barker v. St. Quintin*. (3)]

The lien of the attorney has been carried much further than in that case. In *Ex parte Cleland* (4) an order for costs had been made against one Davies, with liberty to Cleland to enforce payment by execution, and, notwithstanding Cleland was indebted to Davies in a larger sum, the Court protected the lien of Cleland's attorney, and said execution must be allowed. In other words, Davies' set-off was postponed to the attorney's lien. And Lord Cairns, L.J., says, "The debt or claim for costs is not the debt or claim of Cleland alone, it is, in the view of a court of equity, and upon the principles of a court of equity, a debt or claim which has been assigned or incumbered; and the persons entitled to it now are, not Cleland alone, but Cleland and his solicitor, the claim of the solicitor being paramount to that of Cleland. That consideration, in my opinion renders it impossible that the costs can be set off against the debt." Again, the Lord Justice says: "The costs, though recoverable in the name of Cleland, and though ordered to be paid to Cleland by name, are paid to him, not for his own benefit, for he could not take the money and spend it; but are to be paid to him subject to the lien of his solicitor, and are, therefore, to be held by him, either in whole or in part, as a trustee for his solicitor." In *Eisdell v. Coningham* (5), and *Sympson v. Prothero* (6), it was held that the attorney's lien could not be displaced by a gar-

(1) 12 M. & W. 191.

(2) 7 Man. & G. 648.

(3) 12 M. & W. 441, 451.

(4) Law Rep. 2 Ch. App. 808, 812, 813.

(5) 28 L. J. (Ex.) 213.

(6) 26 L. J. (Ch.) 671.

3 Jan 25 1872

nishee order attaching a judgment debt to answer another judgment debt. In *Ex parte Bryant* (1) a solicitor was held to have a lien upon costs ordered to be paid to his client upon a protection in bankruptcy, although there was no fund in court; and it was held that the client could not retain the benefit of the order to the prejudice of the solicitor. The same doctrine was recognized in *Ex parte Rhodes*. (2) Finally, rule 63 of Hil. T., 1853, fully recognizes the right of the attorney to have his lien protected in all cases.

1872
MERCER
v.
GRAVES.

Brown, Q.C., was not heard in reply.

COCKBURN, C.J. There must be judgment for the defendant. If this were the case of an execution, and the equitable jurisdiction of this Court were invoked for the purpose of allowing one judgment to be set off against the other, there is no doubt that we should protect the interest of the attorney. But there is no analogy between that case and the case of an action on a judgment, to which it is sought to set off another judgment which the defendant has obtained against the plaintiff. It so happens that the plaintiff could not get the benefit of the order or judgment he has obtained in Ireland by taking out execution on it here; but we cannot alter the relative position or rights of the parties on account of this defect in the law. The question is simply whether the defendant has or has not a right to set off his judgment against that of the plaintiff, the reason alleged in the replication that he cannot is, that the attorney for the plaintiff has a lien for his costs on the order or judgment obtained by the plaintiff, and the plaintiff is suing as trustee for his attorney. But the attorney has no such lien for costs as to be able to compel the plaintiff to bring the action on his behalf as trustee for him. In truth, as Mr. Brown pointed out, there is no such thing as a lien except upon something of which you have possession. The matter is thoroughly well explained in Chit. Archb. Practice, pp. 139, 140 (12th ed.), that although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs. But this is

(1) 2 Rose, 237.

(2) 15 Ves. 539.

1872
MERCER
v.
GRAVES.

always on notice to the debtor. The judgment creditor may arrange with his debtor; and the obligation is not between the debtor and the attorney, but between the judgment creditor and the attorney, whose client he is; but this does not make an action, brought to recover the amount of the judgment, an action brought on behalf of the attorney. It is an action brought by the client, by which he seeks to obtain funds with which he may satisfy his attorney; but he cannot on that account prevent the defendant meeting his claim with a legal set-off; and our judgment must therefore be for the defendant.

BLACKBURN, J. I am of the same opinion. This is an action brought upon an Irish judgment or order in the nature of a judgment of nonsuit, to which there is a set-off pleaded of a judgment recovered by the defendant against the plaintiff; and the replication is that the plaintiff is suing as trustee for his own attorney, who has incurred costs in obtaining the judgment, and has a lien upon it for them. I do not doubt that if an action were really brought as trustee for a cestui que trust, and there was a plea of set-off of a debt due from the trustee, a Court of equity would interfere and say it was unjust, and would grant an injunction; consequently, if the replication shewed that the relation of trustee and cestui que trust did exist between the plaintiff and his attorney, there might be ground for supporting the replication. But, notwithstanding what has been urged by Mr. O'Malley, I do not think the attorney, when he has conducted an action to judgment, for which costs are owing to him, stands in the position of a cestui que trust, having an equitable interest in the proceeds of the judgment. The attorney having successfully brought a suit to judgment, has a right to retain any documents in his hands, and the effect is that the money, the fruits of the judgment, passes through his hands, and then he has a right to retain his costs, and any other costs due to him. To some extent the Courts, both of law and equity, will protect the attorney's interests, so as not to deprive him of his costs. But the protection the Courts afford to the attorney stops very far short of putting him in the position of cestui que trust to his client. When execution is about to be executed, and the interference of the Courts is asked to allow the defendant to set-off a cross judg-

ment, the Courts say "We will not interfere to prevent execution so as to take the judgment out of the hands of the attorney, simply because there are cross debts, unless the attorney's costs be first satisfied." But when the defendant has a right to plead a set-off by statute, I am aware of nothing which can enable the attorney to say this shall not be done. In *Barker v. St. Quintin* (1), Parke, B., distinctly lays this down; he says, "The lien which an attorney is said to have on a judgment (which is, perhaps, an incorrect expression), is merely a claim to the equitable interference of the Court to have that judgment held as a security for his debt." Again, in a case which has not been cited, *Brunsdon v. Allard* (2), the Court said they could not interfere to prevent a bonâ fide settlement of cross actions by the parties themselves, although it might have the effect of depriving one of the attorneys of his costs, his client having become insolvent. And, though the majority of the Court expressed an opinion that, if there had been collusion or fraud, possibly then the Court might have interfered, Crompton, J., doubted whether, in such a case, the Court ought to interfere; and Erle, J., says, "I am clearly of opinion that the plaintiff in an action is the proprietor of his own suit; that he can deal with it; and, if he gets judgment, that he can do what he likes with it. 'Lien' properly applies to a chattel, and saying an attorney has a lien is only metaphorical, and the words 'equitable lien' are intensely undefined." As to the cases cited, one only has any semblance of authority for the plaintiff, *Ex parte Cleland* (3), but it will be found to be plainly distinguishable. There an adjudication of bankruptcy against Cleland had been set aside, and it was ordered that he should be at liberty to enforce the order for costs against the petitioning creditor, if they remained unpaid, by execution. The debt due to the creditor from Cleland was larger than the amount of costs; but Cleland's attorney was unpaid, and had claimed a lien on the costs. Cairns, L.J., under these circumstances, held that the solicitor's lien must be respected, and that the debt ought not to be set off against the costs. No doubt there are expressions used by Cairns, L.J., which to a certain extent justify the reliance Mr. O'Malley put upon them; but all that they

1872

 MERCER
v.
GRAVES.

(1) 12 M. & W. at p. 451.

(2) 2 E. & E. 19; 23 L. J. (Q.B.) 306.

(3) Law Rep. 2 Ch. App. 808.

1872

MERCER
v.
GRAVES.

really amount to is, that the Court of Chancery would not, any more than a Court of law, interfere to allow a debt to be set off against an execution, except on the terms of the attorney's lien being discharged. It is, therefore, no authority for saying that the relation of trustee and cestui que trust exists between a judgment creditor and his attorney; and to hold this would introduce great mischief, and would be to run counter to decided cases. *Brunsdon v. Allard* (1) would clearly have been wrongly decided if this were the law. I may add, that the garnishee cases are not analogous; it was in effect taking the matter out of the hands of the attorney, and it was but equitable that the amount of the attorney's costs should be secured to him before the money was paid over to the judgment creditor.

LUSH, J. I am of the same opinion. This is not an application to the Court to allow a cross judgment to be set off against another, an execution being taken out, to allow which is discretionary with the Court, and is only granted on the terms that he who asks equity must do equity by first paying the attorney his costs. Nor is it an application under the garnishee clauses of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, ss. 29, 30), which apply to the case of persons having liens upon debts, and may very possibly extend to the case of an attorney having a lien for costs. Neither is it a case within 23 & 24 Vict. c. 127, s. 28, for this is not a judgment by which any property is recovered or preserved, as it is an order in the nature of a judgment by which the plaintiff is entitled to the costs of a nonsuit in the Irish Court. It is simply a case in which the defendant pleads to an action on a judgment a set-off of a cross judgment, which by the Statute of Set-off he is absolutely entitled to do, and this Court has no discretion in the matter. The plaintiff, however, by his replication, says it is inequitable to allow the defendant to plead this set-off, because the debt which he sues for is really due to his attorney, being a debt for costs for which the attorney has a lien. The plaintiff says, in effect, a Court of equity would interfere and restrain the defendant from pleading that plea. We have no authority as a Court of law to interfere, and the question is whether there is any authority in

(1) 2 E. & E. 19; 28 L. J. (Q.B.) 306.

a court of equity to interfere in such a case ; and no precedent has been produced in support of the proposition, that an attorney could maintain a bill in equity in such a case against a judgment debtor, to restrain him from exercising his own legal rights under the Statute of Set-off. Such a proposition cannot be supported. A judgment debtor may pay the debt, if he likes, to the creditor ; he may settle with him on terms, and there is not even a dictum that the Court can interfere, provided it is done honestly. In order to succeed on this demurrer Mr. O'Malley must establish the above proposition ; but the only case which he has brought to our notice at all approaching it in any degree is *Ex parte Cleland* (1) ; but on examination that turns out to be essentially different from the present case. There A. had been ordered to pay B. certain costs, with liberty to B. to enforce payment by taking out execution, and B. was indebted in a larger sum to A., and A. executed a deed of composition which B. had not signed, and the question was whether A. was to be considered a debtor to B. for the costs, or whether he had a right to set-off his debt, in which case B. would be indebted to A. The Court below having refused to allow B. to take out execution against A., on appeal he was allowed to do so. Lord Cairns, L.J., says, that there would have been no right of set-off, if nothing in the nature of bankruptcy had intervened, and *à fortiori* a set-off under the circumstances would not have been allowed in bankruptcy, and therefore that A. remained indebted to B. for the whole amount of costs ; and in this way effect was given to the attorney's lien. That is essentially the same thing as if a litigant had applied to this Court to allow him, in the exercise of our equitable jurisdiction, to set off one judgment against the other, and before granting the rule, we should say, " You, who ask for equity, should first do equity by paying the attorney." That is quite a different thing from there being any equity to ground such a replication as the present.

QUAIN, J. I am also of the same opinion. It seems to me that it was incumbent on Mr. O'Malley to cite some authority in equity to shew that the effect of the so-called lien of the attorney is equivalent to an assignment or charge on the judgment. There is

(1) Law Rep. 2 Ch. App. 808.

1872

MERCER
v.
GRAVES.

no such authority, and there are several cases which shew that the client may settle with his opponent, or discharge him, and so get rid of the lien of the attorney: and it is plain, therefore, that the client and attorney are not in the position of trustee and cestui que trust. The only semblance of authority is *Ex parte Cleland* (1), and there are certain expressions used by Lord Cairns which justify Mr. O'Malley in relying on it. The Lord Justice says: "The debt or claim, therefore, for costs is not the debt or claim of Cleland alone, it is in the view of a Court of equity, and upon the principles of a Court of equity, a debt or claim which has been assigned or incumbered, and the persons entitled to it now are, not Cleland alone, but Cleland and his solicitor, the claim of the solicitor being paramount to that of Cleland." That is certainly very wide and general language; but it must be taken with reference to the matter in hand; and when we look at the matter before the Court, the decision of the Court was really nothing more than doing in a court of equity what we do at law under the rule of court, viz., refuse to allow a set-off of one judgment against another unless the attorney's lien is satisfied. To say that the relation of trustee and cestui que trust exists between the client and the attorney, is not strict language, but metaphorical language; for there is no such relation created when the summary jurisdiction of the Court is exercised or modified in favour of the attorney's lien; and if there is no trust created, then there is nothing in the replication that can set aside the legal right of set-off conferred by the statute.

Judgment for the defendant.

Attorney for plaintiff: *D. Keane.*

Attorneys for defendant: *Lewis & Lewis.*

(1) Law Rep. 2 Ch. App. 808, 812.

CHRISTOFFERSEN v. HANSEN.

1872

April 26.

Charterparty, Construction of—Clause as to ceasing of Agent's Liability on loading of Cargo.

By a charterparty between plaintiff and defendant it was agreed, that plaintiff's ship should, with all convenient speed, proceed to Sunderland, and that defendant should there load the ship in regular turn with a full cargo of coals, and the ship should proceed with it to Kiel, and deliver to freighter or assigns, on payment of certain freight; "and that, the charter being concluded by defendant on behalf of another party resident abroad, all liability of defendant should cease as soon as he had shipped the said cargo":—

Held, that this clause only exempted defendant from liability accruing *after* the loading of the cargo; and that he, therefore, remained liable for delay in loading, although he had ultimately loaded a full cargo.

DECLARATION that plaintiff and defendant agreed by charterparty, that plaintiff's ship, called the *Karen Elise*, should, with all convenient speed, sail and proceed to the South Dock at Sunderland, and that defendant should there load the ship in regular turn with a full and complete cargo of coals; and that the ship, being so loaded, should proceed with the cargo to Kiel, and there deliver the same to the said freighter or his assigns on being paid certain freight, to wit, 9*l.* per keel of eight Newcastle chaldrons taken on board; and that neither the merchants nor the freighter were to be held accountable for any delay or detention of the ship, either in loading or discharging, occasioned by frosts, floods, strikes of workmen, or other cause beyond their control; and that, the said charter being concluded by the defendant on behalf of another party resident abroad, all liability of the defendant should cease as soon as he had shipped the said cargo. Averments of all conditions precedent, and that the ship proceeded at once to the South Dock. Breach, that defendant did not load the ship in regular turn, but delayed her for nineteen days.

Third plea, that the charter was in fact concluded by defendant on behalf of another party resident abroad; and that defendant, before this suit, shipped the agreed cargo under the charter, whereupon, according to the terms of the charter, all liability of defendant ceased.

Demurrer, on the ground that the clause in the charterparty

1872

CHRISTOP-
FERSEN
v.
HANSEN.

relied upon in the plea does not apply to liabilities incurred prior to or during the shipment of cargo, but applies only to liabilities occurring subsequently to the shipment.

Joinder in demurrer.

Holker, Q.C. (*Lewers* with him), in support of the demurrer. The clause as to the ceasing of the defendant's liability applies only to liability subsequent to the loading. *Pederson v. Lotinga* (1) turned on a very similar clause: "The charterparty being concluded by *Lotinga* on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master agreeing to rest solely on their lien on the cargo for freight and demurrage;" and the Court decided that it was intended that the defendant should be absolved from future liability, but not as to past liability, and they held him, therefore, liable for delay in loading. That is an *à fortiori* case, because here there is no lien given whatever, and it could never have been intended by the plaintiff to give up the defendant's liability without an equivalent. That case was affirmed in *Oglesby v. Yglesias*. (2) In *Bannister v. Breslauer* (3), which will be cited *contra*, in addition to the clause of cesser, there was an express stipulation that the owners should exercise their absolute right of lien for freight, dead freight, and demurrage; and the ground of the decision was, that there was this absolute lien to cover, not only demurrage, but delay in the nature of demurrage: see the judgments of Brett, J., and Channell, B., in *Gray v. Carr*. (4)

G. Bruce, for the defendant. "All liability shall cease" can only mean all liability past and future.

[LUSH, J. The plaintiff gets no equivalent for letting the defendant go free as to the past. The previous clause seems to shew what was intended.]

He gets a substantial guarantee in the cargo of the responsibility of the foreign principal. *Pederson v. Lotinga* (5), the case relied upon by the other side, was not decided upon the clause as to the ceasing of liability alone, but much stress was laid by the

(1) 28 L. T. 267; 5 W. R. 290.

(2) E. B. & E. 930; 27 L. J. (Q.B.)

356.

(3) Law Rep. 2 C. P. 497.

(4) Law Rep. 6 Q.B. at pp. 536, 546.

(5) 28 L. T. 267; 5 W. R. 290.

Court on the clause as to lien for demurrage, which the Court said did not apply to the demurrage at the port of loading (for which the action was brought), because that was to accrue *de die in diem*; and it was on that distinction that the decision went, and it by no means follows, if the clause as to all liability to cease had stood alone, that the Court would not have held that it applied to past as well as future liability. *Bannister v. Breslau* (1) is expressly in point for the defendant, though it is true the Court relied much upon the clause giving a lien; but in *Oglesby v. Yglesias* (2) there was no clause as to lien, and yet the Court decided that the defendant's liability was put an end to *ab initio*.

[BLACKBURN, J. The words there were express and unambiguous, as they were in *Milvain v. Perez* (3)].

Holker, Q.C., in reply. *Pederson v. Lotinga* (4) is a stronger case for the plaintiff than the present, for there there was a lien given, here there is none.

COCKBURN, C.J. I think that this case clearly comes within the principle of *Pederson v. Lotinga* (4), which is nearer to the present case than any of the other cases cited; and that decision, I think, is binding upon us. This is an action on a contract of charterparty between the plaintiff, the shipowner, and the defendant, as agent for a foreign principal, whereby the vessel was to proceed to Sunderland Dock, and the defendant engaged there to load a full cargo of coals in regular turn, which the ship was then to carry to Kiel. The action is for delay on the part of the defendant at the port of loading. And there can be no doubt that the defendant has become liable for this delay by making himself a principal in the charterparty, except so far as he may be exempt by a stipulation in the charterparty. The stipulation is, "that, the charterparty being concluded by the defendant on behalf of another party resident abroad, all liability of the defendant should cease as soon as he had shipped the said cargo." What is the construction which we ought to put on that stipulation independently of all authority? The language is, to a certain extent, ambiguous;

(1) Law Rep. 2 C. P. 497.

(3) 3 E. & E. 495; 30 L. J. (Q.B.)

(2) E. B. & E. 930; 27 L. J. (Q.B.) 90.

(4) 28 L. T. 267; 5 W. R. 290.

1872
CHRISTOF-
FERSEN
v.
HANSEN.

it may mean that all liability, on the part of the defendant, both as to past breaches and as to possible future breaches, shall be entirely extinguished as soon as the cargo is loaded; or it may mean, that, whereas the defendant would be liable for all breaches of the contract, both before and after the loading, as to all that is to be done touching the completion of the contract after the loading the shipowner should look to the foreign principal. Which is the more probable and reasonable construction of the two? The shipowner here in England would know little or nothing of the parties abroad, though he would know them to be persons of some substance by reason of their having put valuable cargo on board his ship; but he would be obliged to sue them in a foreign court for any breach of the contract, though committed here, unless circumstances occurred to enable him to sue in England. Of course, therefore, the shipowner would be desirous of having a person liable whom he could sue in this country, rather than only persons within the jurisdiction of a foreign court. But, on the other hand, the agent, while ready and willing to submit to the obligation of the contract, so far as his own acts went, or the acts of others over whom he had control on this side the water, up to the loading of a full cargo, might naturally refuse to become liable for the completion of the contract, or for what might or might not be done on the other side of the sea. Consequently that seems to me to be the construction which we ought, on principle, to put on the language used in this charterparty, looking at the relative position of the parties. But it is not necessary to decide this case solely on principle, for the case of *Pederson v. Lotinga* (1) is directly in point, and is even a stronger case than the present, for there, in addition to a similar clause, there was an express statement that the shipowners agreed to look solely to their lien upon the cargo for freight and demurrage. These words do not occur in the charterparty now before us. Therefore the absence of them is more in favour of the plaintiff's construction, shewing that he did not intend to give up all liability on the part of the defendant. On the whole, whether on principle or authority, I think our judgment must be for the plaintiff.

(1) 28 L. T. 267; 5 W. R. 290.

BLACKBURN, J. I also am of opinion that our judgment should be for the plaintiff. At one time I had some doubt; but I have now made up my mind pretty clearly in favour of the plaintiff. The first thing to be considered is, that in a charterparty, as in every contract, if the agent chooses to make himself a contracting party, the other contracting party may either sue the agent who has himself contracted, though on behalf of another, or he may sue the principal who has contracted through his agent; and this, whether the principal was known at the time or not, or whether it was or was not known that there was a principal. Moreover, this would be independent of any remedy acquired by a stipulation for lien or otherwise over the goods. Now it seems to me not unreasonable for the agent to say, "I prefer that you should look to my principal, and not hold me liable for things happening abroad;" and it would be equally reasonable for the shipowner to say, "When I have a cargo I shall have a lien, and the liability of the foreign principal who owns the cargo will therefore be sufficient after you have loaded the cargo, and after this I shall be content to let you free." If they chose to make such an agreement, they were at perfect liberty to do so, and there is nothing repugnant or improbable in their doing so. It was the expressions made use of in some of the cases which have made me doubt to what extent the plaintiff intended to free the defendant. In some of those cases there was an express mention of lien. But in the protecting clause of the present charterparty there is no mention of lien, and as far as the charterparty is set out in the declaration there is no mention at all of lien for demurrage. The protecting clause is, "that, the charterparty being concluded by the defendant on behalf of another party resident abroad, all liability of the defendant should cease as soon as he had shipped the said cargo." That is, the defendant, though he be an agent for another, himself contracts to load a full cargo in due course, but stipulates by a condition subsequent, that as soon as he had loaded a full cargo all liability on his part should cease. Does that mean all liability ab initio? If it does, the defendant is absolved, and the plaintiff is wrong. Such a contract was clearly made beyond all question from the express words used in *Oglesby v. Yglesias* (1),

1872

CHRISTOPHERSEN
v.
HANSEN.

(1) E. B. & E. 930; 27 L. J. (Q.B.) 356.

1872
CHRISTOP-
FERSEN
v.
HANSEN.

and *Milvain v. Perez*. (1) Whether the plaintiff would be prudent in making a contract that on loading the cargo the agent shall be exempt from all liability past and present as well as future, is only for him to consider. We must interpret this charterparty without reference to whether the ship was British or foreign; and there would à priori, as it seems to me, be some difficulty in saying that "all liability shall cease" was not a condition subsequent meaning that all liability ab initio should cease on shipment of the cargo. But when we look at the authorities we find there are some which say that "all liability shall cease" means shall cease from that moment, not ab initio, but as to all future things, not releasing the defendant from vested rights of action. In *Pederson v. Lotinga* (2), the charterparty, I presume, gave liens, but whether that was so or not, there was a clause, "the charterparty being concluded by H. S. Lotinga, on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master agreeing to rest solely on their lien on the cargo for freight and demurrage." That shews that the shipowners were, in fact, relying on their lien, and not looking to the liability of the undisclosed principal; and the question was the meaning of this latter clause, and the Court of Queen's Bench all say, that "lien for demurrage" must mean lien for demurrage occurring after the loading at the port of discharge, as the clause as to demurrage at the port of loading was that it should be payable de die in diem. The Court, therefore, seem to have thought that the stipulation as to the demurrage being payable day by day, shewed that this was a vested right which it was not intended should be done away with. But if the clauses as to demurrage at the home and foreign port had been alike in form, the demurrage already incurred would have been a vested right. So that I understand the reasoning of the Court to be, that, inasmuch as a vested right of action might have been incurred by the agent, it was not to be implied by this clause, or condition subsequent, that "all liability should cease," that all liabilities for the past as well as for the future were to cease.

Then came the case of *Bannister v. Breslauer* (3). This was not

(1) 3 E. & E. 495; 30 L. J. (Q.B.) 90. (2) 28 L. T. 267; 5 W. R. 290.

(3) Law Rep. 2 C. P. 497.

the case of an agent, but the charterparty was by the charterers themselves as principals, and there was a clause, "the charterers' liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien for freight, dead freight, and demurrage, which he, or owner, shall be bound to exercise." Now, I understand the decision of the Court in that case proceeded on the ground, as my Brothers Willes, Channell, and Brett seem to have understood it in *Gray v. Carr* (1), that the charterers stipulated to be free from all liability, and that the other party should rely on their absolute lien alone. In *Gray v. Carr* (1), that case became of some importance, the ingenuity of counsel having pointed out that the decision could not be supported unless "lien for demurrage" would give a lien for unliquidated damages in the nature of demurrage for detention of the vessel. But Brett, J., and Channell, B., both seem to consider the decision on that point as very questionable. The judgments of the Court of Common Pleas, however, seem clearly to shew that the ground of their decision, that all liability of the charterers ceased for the past as well as the future, was that there was an absolute lien given for dead freight and demurrage, which the shipowners were bound to exercise. In the present case there is no lien apparently given, and no such clause following the clause as to the ceasing of liability, and for the reasons I have given, the case of *Pederson v. Lotinga* (2) seems a direct authority, that a clause like the present is not enough to enable the defendant to get rid of all liability as to vested rights of action. I have less difficulty in coming to this conclusion from the consideration that if persons wish and intend to get rid of all liability, past as well as future, they can very easily do so by expressing themselves in unambiguous language like that used in *Oglesby v. Yglesias*. (3)

LUSH, J. I am of the same opinion. I own it appears to me a very plain case, and I think there can be no question what is meant; though I admit the clause, "all liability of the defendant shall cease as soon as he has shipped the cargo," may be interpreted

1872

 CHRISTOPHERSEN
v.
HANSEN.

(1) Law Rep. 6 Q. B. at pp. 536, 546.

(3) E. B. & E. 930; 27 L. J. (Q.B.)

(2) 28 L. T. 267; 5 W. R. 290. 356.

1872

CHRISTOF-
FERSEN
v.
HANSEN.

to mean one of two things, either that in the event named he shall no longer be responsible for any breach, past or future, or simply that he shall be no longer liable for the future performance of the contract. But which is the sense in which the parties intended it? By the charter the defendant bound himself to provide a cargo so that it should be shipped in regular turn, and also to pay freight at the port of discharge. Now, he did not load in regular turn, and the action is for detaining the ship nineteen days. The defendant, however, eventually did load a cargo, and now says, having shipped the cargo, he is relieved from all liability. If there were any provision giving the shipowner an equivalent advantage, that would be a very good reason for his absolving the defendant altogether; but there is no such provision. On the loading of the cargo there was a very good reason for absolving the defendant from liability for freight, because the plaintiff had then got a cargo which would enable him to pay himself. But the shipowner could not have recourse to the cargo as a remedy for delay in loading, which neither the law nor the contract gives him, and therefore, if he gave up the liability of the defendant for past breaches, he would have no remedy except against the foreign principal, who is not even named, and perhaps not known. I think, therefore, that the more reasonable construction to put upon the clause in question is, that it was intended that as soon as the cargo was put on board the contract was to be at an end as far as the defendant was concerned, and he was to incur no further responsibility, remaining, however, liable for any breach of his contract that had occurred up to the completion of the loading.

Judgment for the plaintiff.

Attorney for plaintiff: *John Scott, for Graham, Sunderland.*

Attorneys for defendant: *Williamson, Hill, & Co., for Ingledew & Daggett, Newcastle.*

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[IN THE EXCHEQUER CHAMBER.]

1872

May 10.

IONIDES AND CHAPEAUROUGE *v.* THE PACIFIC FIRE AND MARINE INSURANCE COMPANY.

*Marine Insurance—Policy to cover Goods upon Ship or Ships to be declared—
Misnomer—Effect of Slip of Policy—30 Vict. c. 23, s. 7.*

The plaintiffs, by order of K., at Hamburg, opened with the defendants a policy on hides by ship or ships to the extent of 5000*l.* The slip was signed on the 23rd of September, 1869, but the policy had not then been made out; on the 3rd of February, 1870, one of the plaintiffs went to the defendants' office, taking with him the slip for the 5000*l.* policy, and filled up two slips, one for 2455*l.* on hides, per *Socrates*, and another slip for 2500*l.* on hides by another vessel; he stated to the defendants' clerk that it would be more convenient to both parties to have two separate policies, instead of drawing up an open policy for 5000*l.*, and then declaring it on 4955*l.* The defendants' clerk acquiesced, and initialed the two slips, and afterwards the policies were executed by the defendants. There was a Norwegian ship, the *Socrates*, and a French ship, the *Socrate*, both described in the *Veritas*, the risk on the latter being greater than on the former. The hides insured by the policy were shipped on board the *Socrate*, and lost. At the trial the jury found that the parties, on entering into the contract, both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, and that the defendants did not mean only to insure hides on board the *Socrates*:—

Held, affirming the judgment of the Queen's Bench, that the defendants, being bound on the 3rd of February to insure hides on board any ships selected by the plaintiffs, the misnomer was of no consequence, and the defendants were liable.

By 30 Vict. c. 23, s. 7, no contract or agreement for sea insurance shall be valid, unless expressed in a policy:—

Held, affirming the judgment of the Queen's Bench, that, notwithstanding that statute, the slip might be given in evidence, though not valid as a contract, as evidence of the intention of the parties.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter the verdict for the defendants. (1)

The action was brought to recover the amount of a general and particular average loss sustained by the plaintiffs, in respect of their interest in certain hides, which the defendants had, as the plaintiffs alleged, insured on a voyage from Ceara to Hamburg, by two different policies of insurance. The cause came on for trial before Hannen, J., at the sittings after Michaelmas Term,

(1) Law Rep. 6 Q. B. 674, where the pleadings are set out.

1872
 IONIDES
 v.
 PACIFIC
 INSURANCE CO.

1870, when a verdict was found for the plaintiffs upon the two policies, leave being reserved to the defendants, as hereafter mentioned.

1. The plaintiffs are ship and insurance brokers carrying on business in the city of London, and have for some years been in the habit of effecting insurances by the instructions of a Mr. Schaffler, an insurance broker at Hamburg. Some of these insurances were on behalf of a Mr. Gayen and others on behalf of Messrs. Kalkman, both merchants at Hamburg.

2. The defendants are a company carrying on business in the city of London as underwriters, and prior to August, 1869, had been in the habit from time to time of effecting insurances for the plaintiffs on ship or ships.

3. On the 12th of August, 1869, the plaintiffs effected on behalf of Messrs. Kalkman with the defendants a policy of insurance for 3000*l.* on hides per ship or ships, as might be declared, from any port or places at the Brazils, to any port of call in the United Kingdom. On the 13th of August another similar policy was effected for 2354*l.* on behalf of Mr. Gayen.

4. On the 23rd of September, 1869, the plaintiffs received a letter from Schaffler of which the following are the material parts: "Messrs. Kalkman hereby request you to open at once a policy of insurance on hides to the amount of 5000*l.*, as by their next letter they will have to declare 5000*l.* to 4000*l.* on that head."

5. On receipt of this letter the plaintiff Chapeaurouge had an interview with Mr. Drummond, the underwriter of the defendants, when a slip was submitted to and accepted by Drummond on behalf of the defendants, for an insurance on hides by ship or ships and steamer from Brazils to the United Kingdom, ^{and} ^{or} steamer to Hamburg, at 60/ to the amount of 5000*l.*, not more than 2500*l.* by each vessel.

6. At this interview, according to the evidence of Drummond, the plaintiff Chapeaurouge stated that the ships to be declared under it would be first-class vessels, and that the consignees would be first-class people. Chapeaurouge denied this; but said that, in answer to inquiries from Drummond upon the subject, he might have referred to the declarations made upon previous policies which in many instances were on first-class

German ships, but that he did not remember any such thing having occurred.

7. The plaintiff Chapeaurouge then filled up a slip on one of the printed forms kept by the defendants, more in detail, but corresponding with the other slip, and left it at their office.

1872
IONIDES
v.
PACIFIC
INSURANCE CO.

8. On the 21st of January, 1870, a letter, of which the following is an extract, was received from Schaffler by the plaintiffs:—"Hamburg, 19th January, 1870. Messrs. Ionides & De Chapeaurouge, London. Messrs. Kalkman declare as follows . . . Cotton from Ceara to Hamburg per *Socrates*, Jean Card. K /100—100 bales cotton valued at 730*l*."

9. On or about the 23rd of January, 1870, the plaintiffs received a letter from Schaffler dated the 22nd of January, 1870, of which the material part was as follows:—"I beg to refer you to my respects of yesterday's date, and this is to inform you that Mr. Gayen is declaring to-day from Ceara to Hamburg by the *Socrates* bill of lading dated the 23rd of December last year made out to order:—1400 dry salted hides, 1450*l*. "Mr. Gayen keeps upon his hide policy only 1500*l*.; still as, however, he does not expect any fresh shipments near at hand he does therefore not feel disposed at the present moment to enter upon fresh insurances."

10. On the 24th of January, in pursuance of the instructions contained in the above letter, the plaintiff Chapeaurouge made an indorsement upon the policy of the 13th of August, 1869, as follows:—"The following interest is now declared and agreed to attach to this policy . . . Per *Socrates*, Ceara to Hamburg B /£ 23rd December. 1400 dry salted hides valued at 1450*l*. London, 24th January, 1870."

He then gave the policy to his clerk Lambert, and directed him to take it to the defendants.

11. At the same time Chapeaurouge having noticed that a portion of the hides belonging to Mr. Gayen were insured in the Progress Insurance Company, which had failed, instructed Lambert to offer that portion of the insurance to the defendants, and wrote in pencil in the fold of the policy the words following: "Reinsurance Progress 121*l*."

12. At this interview between Chapeaurouge and Lambert, they both referred to the *Veritas*, and found in it that there were two

1872
IONIDES
v.
PACIFIC
INSURANCE CO.

ships—The *Socrates*, a Norwegian ship, Albertsen, master, built in 1866, and the *Socrate*, a French ship, Jean Card, master, built in 1856.

13. Chapeaurouge observed to Lambert that he supposed that the *Socrates* referred to in the letter of the 22nd of January was the Norwegian ship, as that ship was most likely to be engaged in the trade, or words to that effect.

14. In consequence of these instructions Lambert called upon Drummond on the same day, and handed him the policy of the 13th of August, which Chapeaurouge had endorsed as above, to initial, and at the same time he offered the reinsurance for 121*l*.

15. Drummond turned to the Veritas, and finding in it entries of the *Socrates* and *Socrate*, asked if the *Socrates* was the ship. Lambert replied that he thought so, whereupon Drummond handed the policy to his clerk Lark to initial, and at the same time a slip was prepared for the reinsurance, which risk was taken without discussion at the same premium as the other policies.

16. The following is the account given by Lambert of what passed at the interview:—"He, Drummond, asked me to shew him the ship. I found it in the Veritas. There are two ships, the *Socrates* and the *Socrate*. I said, 'I think this is the ship' (pointing to the *Socrates*). I believed it to be the ship. I did not tell him what information I had. I then prepared a slip, and this is it. And, further (on cross-examination) I mentioned the name *Socrates*. The French Veritas was on the table. I think I took it up. I pointed to the *Socrates*. I suppose I led him to believe it was the *Socrates*."

17. The following is the account given by Drummond:—

"The plaintiff's clerk Lambert called on me on the 24th of January, and presented me with the open policy and a declaration of the *Socrates*, which I passed to my assistant for registering in our books. He then produced a slip for 121*l*, on which I referred to the Veritas. I found two vessels, and said to him, 'Which is your vessel?' He said, '*Socrates*.' In taking that risk I believed I was insuring a risk on a specific vessel—the *Socrates*, Captain Albertsen, the Norwegian. In issuing the policy of that date I thought I was insuring the *Socrates*. The risk on the *Socrate* was

decidedly greater than on the *Socrates*. I would not have insured the *Socrate*."

18. The French Veritas is a book in which are entered the names and descriptions of foreign vessels, and it is usual and customary for underwriters and others to refer thereto when questions arise as to the names and descriptions of foreign vessels.

19. On the 3rd of February the plaintiffs received a letter from Schaffler, an extract from which is as follows:—

"Messrs. Kalkman declare further on hide policy, by *Socrates*, Captain Jean Card, from Ceara to Hamburg, 2600 dry salted hides, valued at 2700*l*.

"The balance which Messrs. Kalkman have still open at your place is to the amount of 245*l*. on policy No. 13 (that is to say, policy of August 12, for 3000*l*.), and 5000*l*. on policy No. 14 (that is to say, slip of 23 September), out of which 2500*l*. can be declared by ship bill of lading dated January. As the last policies, so far as I can remember, are running up to June, this declaration will be therefore quite in order. In case, then, that you are able to add on the same conditions another sum of 1100*l*., you may further declare, and thus close the hide policy per *Sophie*, Captain Boltzen, from Ceara to Hamburg. 3444 dry salted hides, 3600*l*.

"*Sophie* is 5,6,1,1, K.'s own ship, and the *Serie* is so large that I hope you will have no difficulty in succeeding. In any case I must request you to let me have at once a telegram from you.

"Bill of lading per *Sophie* is likewise dated January in the present year. Moreover, the said gentlemen are declaring on cotton, &c., policy per *Sophie*, Captain Boltzen, from Ceara to Hamburg, U. K., 45 bales of cotton, valued at 340*l*.

"I am looking forward to your telegraphic message."

20. In consequence of this letter Chapeaurouge called the same day upon the defendants and saw their clerk Lark. Chapeaurouge endorsed on the back of the 3000*l*. policy of the 12th of August, 1869, which is referred to in the above letter as No. 13, a declaration of interest on hides per *Socrates* to the extent still open on the policy, viz., 245*l*.

21. He at the same time took the slip for the 5000*l*. policy of the 23rd of September, 1869, mentioned in paragraph 7, and filled

1872

IONIDES
v.
PACIFIC
INSURANCE CO.

1872

IONIDES
v.
PACIFIC
INSURANCE CO.

up two slips, one for 2455*l.* on hides per *Socrates*, and the other for 2500*l.* on hides per *Sophie*.

22. Chapeaurouge suggested to Lark that it would be more convenient for both parties to have two separate policies instead of drawing up an open policy for 5000*l.* and then declaring on it for 4955*l.*, which would leave the small balance of 45*l.*; and Lark thereupon initialed the above declaration and the two slips, and in due course the policies were executed by the defendants. The policy, on which the present question arises, was an insurance for 2455*l.* on hides valued at 2700*l.*, from Ceara to Hamburg, on board the ship *Socrates*, whereof — is master.

23. It was admitted between the parties that the hides in which the plaintiffs and their principals were interested were loaded on board the *Socrate*, and not the *Socrates*, in the French *Veritas* mentioned, and that whilst on board that vessel on a voyage from Ceara to Hamburg they were lost by the perils insured against.

24. It was also admitted that there were in existence at the time of the insurance the two vessels as described in the *Veritas*, and that the description therein given of them is correct, and that the risk on the *Socrate* was greater than on the *Socrates*.

26. The judge left to the jury the question, amongst others, whether the parties, in making the policies, both meant to insure the hides by the vessel on which they were shipped, whatever her name might be, though they supposed her to be the *Socrates*, or whether the defendants meant to insure hides on board the *Socrates*.

27. The jury found for the plaintiffs upon the questions submitted to them, and the verdict was entered for the plaintiffs, subject to leave reserved to the defendants to enter a verdict for them.

28. On the 14th of January, 1871, the defendants obtained a rule nisi to set aside the verdict so entered for the defendants, pursuant to leave reserved by the judge, on the ground that no insurance was ever effected on goods on board the *Socrate*, and no loss was proved within the meaning of the policies declared upon; or why a new trial should not be had between the parties, on the ground that the learned judge misdirected the jury in putting to the jury as material whether they thought the parties intended to insure the hides by whatever ship they might be carried, or that there were any evidence proper to be submitted to

them that the parties insured or meant to insure hides carried by any other ship than the *Socrates*, and that they might properly find for the plaintiffs on the pleas of concealment and misrepresentation, upon the evidence, of the captain's name under the circumstances proved; and also on the ground that the verdict was against the evidence.

29. The rule came on for argument in Trinity Term, 1871, when the Court made it absolute to enter a verdict for the defendants upon the re-insurance policy, and discharged it as to the other.

The defendants appealed against this latter decision.

Milward, Q.C. (*Murphy* with him), for the defendants, contended that the defendants were not liable, inasmuch as the policy stated the hides to have been shipped on board the *Socrates*, whereas in fact they were shipped on board the *Socrate*; and that there had been a misrepresentation by the plaintiffs in giving the name of *Socrates* as the vessel on board of which the hides had been shipped. He also contended that s. 7 of 30 Vict. c. 23, by enacting that no contract or agreement for sea insurance shall be valid unless expressed in a policy, and by s. 9 that no policy shall be pleaded or given in evidence in any court unless duly stamped, rendered the slip inadmissible in evidence for every purpose: *MacKenzie v. Coulson*. (1)

Cohen (*Lanyon* with him), for the plaintiffs, contended that the policy was executed in pursuance of the slip of the 23rd of September, by which the defendants undertook to insure hides on ship or ships, and that a mistake in the name of the ship did not vitiate the policy: *Le Mesurier v. Vaughan* (2); *Hall v. Molineaux*. (3) He also contended that the slip was admissible in evidence: *Cory v. Patton*. (4)

KELLY, C.B. In this case we have to consider two questions: first, whether the verdict entered for the plaintiffs is supported by the evidence; secondly, whether a document called a slip, which was received in evidence at the trial, is admissible. The policy is

1872

IONIDES
v.
PACIFIC
INSURANCE CO.

(1) Law Rep. 8 Eq. 368.

(2) 6 East, 382.

(3) 6 East, at p. 385.

(4) Ante, p. 304.

1872 upon goods coming from Brazil by a ship described as the ship
IONIDES *Socrates*; but the fact was that the goods were shipped on board a
v. French ship, the *Socrate*.
PACIFIC
INSURANCE Co.

The first point is, whether the ship *Socrates* is so named in the policy as to make it an essential part of the contract between the parties that that particular ship, and no other, should be the subject of the policy; or whether the contract was such—and that not inconsistently with the language of the policy itself—as to make it apply to any ship or ships by which the goods (a cargo of hides) were coming from Brazil to England.

It appears from the case that at an early period of the transactions several communications had taken place between the parties, and that there was a Norwegian ship *Socrates*, commanded by one Albertsen, and a French ship *Socrate*, commanded by one Jean Card, both described in the Veritas. On the 23rd of September, 1869, the plaintiffs, on behalf of Messrs. Kalkman, opened with the defendants a policy on hides by ship or ships to the extent of 5000*l*. The slip was signed, but the policy had not been made out. On the 3rd of February the plaintiff Chapeaurouge went to the defendants' office, taking with him the slip for the 5000*l*. policy of the 23rd of September, 1869, and filled up two slips—one for 2455*l*. on hides per *Socrates*, and the other for 2500*l*. on hides per *Sophie*—and suggested to the defendants' clerk that it would be more convenient to both parties to have two separate policies instead of drawing up an open policy for 5000*l*., and then declaring it on 4955*l*. The defendants' clerk acquiesced, and initialed the two slips, and in due course the policies were executed by the defendants. Some other transactions at the same time took place between the parties relating to other policies, which formed the subject of discussion in the court below, but from which there has been no appeal. It thus appears that this policy on hides was framed and executed upon a declaration of a ship, or it may be ship or ships, and consequently it was competent to the parties to name any ship they thought fit, and that in pursuance of that they named the ship *Socrates*. It then becomes necessary to consider, when they named the *Socrates*, what the parties really intended.

Authorities have been cited to shew that in a certain class of

cases the precise name of the ship mentioned in the policy is not material, as, for example, where the *Leonard* was written instead of the *Leopard*. (1) This is a case somewhat of the same nature, and I think the parties did really enter into this contract for a policy in pursuance of an arrangement between them that the policy was to be on hides by ship or ships to be declared. It was admitted that hides to the value insured had been shipped on board the *Socrate* by the parties interested, and that they had no hides whatever on board the *Socrates*, and that the *Socrate* was a total loss. At the trial the learned judge left it to the jury to say whether the parties entering into this contract meant to insure hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, or whether the defendant meant to insure hides on board the *Socrates*. The jury answered this question in favour of the plaintiffs. If the policy was executed in pursuance of the contract of the 23rd of September, and it was the intention of the parties that that contract was to be on hides by ship or ships to be declared, then the name of the ship on which the hides were shipped becomes immaterial. I must, however, say I think that the mode in which the policy was prepared and executed was of a somewhat irregular character; but the jury have found their verdict for the plaintiffs, and I think that verdict right upon the evidence.

The second question is, whether this slip was admissible in evidence at all, and if it were, whether it was admissible in evidence for the purpose for which alone it was used on the trial of this cause. Now, it is quite true that, under the statute in question (30 Vict. c. 23, ss. 7, 9), the document called a slip, although it is binding in point of honour between parties circumstanced as these parties were, is made void as a contract, and, as such, inadmissible in evidence. It is not like an agreement for a lease, upon which an action can be brought for the non-acceptance of the lease, or the refusal to grant a lease; but, as a contract for a policy of assurance to be afterwards made, it is a mere nullity.

It does not, however, follow that it is not admissible in evidence for a great variety of purposes. In this case it is unnecessary to do more than to consider whether it is admissible in evidence for

(1) *Hall v. Molineaux*, 6 East, at p. 385.

1872
IONIDES
v.
PACIFIC
FIRE AND
MARINE
INSURANCE CO.

1872
IONIDES
v.
PACIFIC
FIRE AND
MARINE
INSURANCE CO.

the purpose of shewing what the two parties intended at the time they entered into this transaction; in other words, whether they intended it to be a policy pursuant to a previous contract, although that contract was not binding, or whether the policy was a new, separate, and substantive contract, to be construed without reference to the previous acts of the parties. Now, in the first place, it may be observed, that its admissibility was not objected to, and on that ground alone I do not think that we could be called upon to exclude it altogether from the case. If it had been applied to a purpose forbidden by the Act of Parliament, I should not have hesitated to say that it ought not to be considered as admitted, or if admitted, applied to any such purpose. But for many purposes it may legitimately be used, as in cases where a fraud is suggested, or where there is a plea, as here, of misrepresentation, the slip may be evidence of the fraud or misrepresentation charged. Suppose a slip, with a view to an insurance from a port in South America which had been under blockade a little while before the date of the policy, and the slip, at the instance of the plaintiff, described the port as an open port, and the question had arisen whether the policy had been procured by misrepresentation, or whether there was a concealment of the material fact that the port had been under blockade; no one can doubt that upon the collateral question of misrepresentation the slip would be admissible in evidence to prove what the plaintiff had represented. It is quite enough, therefore, to say that here it was not given in evidence to prove a binding contract between the parties or to contradict or to explain, or in any way affect the construction of the policy in question; but it was given in evidence only to shew what their intention was in preparing the policy. For that purpose I am clearly of opinion that it was admissible in evidence and might be used for that purpose. On both points, therefore, we are of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

CHANNELL and CLEASBY, BB., and KEATING and BRETT, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Hillyer, Fenwick, & Stibbard.*

Attorneys for defendants: *Holmer, Robinson, & Co.*

THOMPSON v. COHEN.

1872

May 10.

*Bankruptcy or Liquidation under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)**—Effect of Discharge on Bill of Sale, as to after-acquired Goods—Security**—Licence to seize Goods.*

Declaration for entering plaintiff's premises and seizing goods of plaintiff. Plea: That by indenture the plaintiff assigned all his household goods, &c., on certain premises to defendant, to secure the repayment of 52*l.* lent by defendant to plaintiff; and it was agreed that, if the 52*l.* were not repaid on the day named, and so long as any money should be secured or recoverable by virtue of the deed, defendant was to be at liberty to enter and take, and on default to sell the goods; and it was further agreed that, if, during the continuance of this security, the plaintiff should become possessed of any goods other than those already assigned, the same should in all respects be subject to the deed, and be accordingly seized and sold in the same manner as if they were, at the date of the deed, possessed by plaintiff and duly assigned to defendant. The plea then alleged that defendant seized the goods in the declaration mentioned by virtue of the above deed. Replication: That after the bill of sale, and before the seizing of the goods, plaintiff filed a petition for liquidation of his affairs, which was duly carried out under the Bankruptcy Act, 1869; and that the goods were goods acquired by plaintiff after the liquidation, and plaintiff then held them freed and discharged from the bill of sale. On demurrer:—

Held, that, the debt being released by virtue of the liquidation under the Bankruptcy Act, 1869, the power in the deed to seize after-acquired property so long as the debt remained secured by the deed must fall with it.

Lyde v. Mynn (4 Sim. 505; 1 My. & K. 683) distinguished.

DECLARATION for breaking and entering plaintiff's house, and taking the plaintiff's stock-in-trade and other goods therein.

Fifth plea (except as to so much of the declaration as alleges that the defendant took and seized goods which were part of the stock-in-trade of the plaintiff): That before any of the alleged trespasses a deed of indenture was made between the plaintiff (called the mortgagor) of the one part, and the defendant (called the mortgagee) of the other part, dated the 14th of July, 1871, whereby it was witnessed "that, in consideration of the sum of 52*l.* 10*s.* by the mortgagee paid to the mortgagor at the time of the execution of these presents, the mortgagor doth assign unto the mortgagee all and singular the household furniture, books, plate, linen, china, glass, goods, chattels, fixtures, effects, and things, of him (the mortgagor) now being in and upon the house and premises situate at Nos. 107, 109, and 111, Great George

1872

THOMPSON
v.
COHEN.

Street, Liverpool, occupied by the mortgagor, and which are more particularly specified in the schedule or inventory hereunder written and hereinafter referred to as 'the said property,' to have and to hold the said property unto the mortgagee to and for his own proper use and benefit; provided always that, in case the mortgagor shall pay to the mortgagee the said sum of 52*l.* 10*s.* on the 21st of July, 1871, these presents shall thereupon become void. And the mortgagor doth hereby covenant with the mortgagee that he (the mortgagor) will, on the aforesaid day of payment, pay to the mortgagee the 52*l.* 10*s.*; and it is hereby declared and agreed that it shall be lawful for the mortgagee, as often as he shall think fit, to give to the mortgagor such further or extended time or times for payment beyond the aforesaid day as the mortgagee shall think fit; and also that it shall be lawful (notwithstanding the aforesaid proviso for redemption) for the mortgagee, either immediately or at any time hereafter, to take and retain possession of the said property until all moneys, costs, and expenses hereby secured, or intended so to be, shall be fully paid and satisfied, and also to relinquish and retake and retain possession thereof as often as he shall think fit, without the security being invalidated or in any way prejudicially affected thereby; and it is hereby further agreed and declared that, in case default shall be made by the mortgagor in the payment of the said sum of 52*l.* 10*s.*, or any part thereof, contrary to the covenant on his part hereinbefore contained, it shall thereupon be lawful for the mortgagee, either immediately after such default, or whenever he shall think fit, to sell and dispose of the said property, either by public auction or private contract, for such price as can be reasonably obtained for the same, and to receive and take the moneys to arise from such sale, and thereout, in the first place, to retain and pay himself the said sum of 52*l.* 10*s.*, or so much thereof as shall then remain unpaid, together with the costs of taking and holding possession, removal, sale, and other charges and expenses, &c.; and lastly, to pay to the mortgagor the surplus (if any) of such moneys . . . And the mortgagor doth hereby covenant with the mortgagee that the mortgagor shall not nor will remove the said property or any part thereof from the said house and premises where the same now is, or from any other house and premises

where the same or any part thereof may be at any time during the continuance of this security, without the consent in writing of the mortgagee first obtained . . . And it is hereby agreed that it shall be lawful for the mortgagee, at any time hereafter whenever he shall think proper, by himself or his agent, servants, or others, so long as any money shall be secured by or be recoverable by virtue of these presents, to enter into and upon the hereinbefore mentioned house and premises, or into and upon any other house or office, apartment or premises, in or upon which the said property or any part thereof shall be, for the purpose of taking and holding possession thereof, or of removing the same, or of examining the state and condition thereof; and if, upon such examination, any portion of the said property shall be found to be deficient, or if the said property shall be found to be deteriorated in a greater degree than would be caused by reasonable wear and tear, it shall be lawful for the mortgagee forthwith, or whenever he shall think proper, to sell and dispose of the said property in the same manner as he might sell and dispose of the same if default were made by the mortgagor contrary to the covenant for repayment hereinbefore contained . . . And it is hereby agreed and declared that, if the mortgagor shall at any time or times hereafter during the continuance of this security become possessed of any household furniture, books, plate, linen, china, glass, goods, chattels, or effects other than or in addition to the said property, the same shall be in all respects subject to these presents, and may accordingly be seized, sold, and disposed of, and in the same manner to all intents and purposes as if the same were now possessed by the mortgagor, and were duly assigned to the mortgagee by these presents . . ."

The schedule attached was set out; and the plea then averred that the house and premises in the declaration mentioned are the house and premises in the deed mentioned, and that during the continuance of the said security, and whilst the moneys thereby secured remained unpaid and unsatisfied, and after the time for the payment of the same had elapsed, the defendant did, under and by virtue of the deed, peaceably and quietly enter into the said house and premises in order to take and hold possession of the said household furniture, goods, chattels, and effects in the deed mentioned, and took and held possession of the same under

1872

THOMPSON
v.
COHEN.

1872
THOMPSON
v.
COHEN.

and by virtue of the deed, which are the alleged trespasses to which this plea is pleaded.

Replication, on equitable grounds, that after the granting of the bill of sale, and before the happening of the grievances in the plea sought to be justified, the plaintiff did, on the 26th of July, 1871, duly file, in the county court of Lancashire holden at Liverpool, a petition for the arrangement of his affairs, pursuant to the Bankruptcy Act, 1869, and under such petition a trustee of the estate and effects of the plaintiff was duly appointed, and took possession of the said goods by virtue of his office; and the creditors of the plaintiff under such petition resolved that the affairs of the plaintiff should be liquidated by arrangement and not in bankruptcy, and all things have been done and have happened, and all times have elapsed to render the said liquidation and the proceedings thereunder binding upon the defendant. And afterwards and before the happening of the grievances herein complained of, the said trustee sold the said goods to divers friends of the plaintiff, who thereupon gave the plaintiff possession thereof, and he then held the same freed and discharged from the said bill of sale, and from all charge or claim of the defendant thereon.

Demurrer and joinder.

G. Bruce, for the defendant. By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 125, subs. 10, the discharge of a debtor under a liquidation has the same effect as a discharge in bankruptcy; and by ss. 12 and 49 the discharge in bankruptcy releases the debtor from all debts proveable under the bankruptcy; but by s. 12 a security upon the property of the bankrupt is expressly saved. In the present case, therefore, the debt is gone but the security remains; and after-acquired property of the plaintiff remains liable under this mortgage. This was expressly decided in *Lyde v. Mynn* (1), where it was held that, although an annuity granted by A. to B. for a good consideration was discharged by A.'s bankruptcy, yet a covenant to charge, by way of security, the annuity on any property which A. might receive from his wife was not discharged. In *Ex parte Pain* (2), the usual warrant of attorney given under the Insolvent Act (1 & 2 Vict. c. 110), to enter up judgment on

(1) 4 Sim. 505; 1 My. & K. 683.

(2) Law Rep. 3 Ch. App. 639, 641.

1872

THOMPSON
v.
COHEN.

after-acquired property, was held still to charge after-acquired property, notwithstanding an intervening discharge of the debtor under his bankruptcy. Wood, L.J., there says, by s. 161 of the Bankruptcy Act, 1861, the discharge in bankruptcy discharges the bankrupt from all debts, &c., proveable under the bankruptcy. "He cannot be arrested or sued for any of such debts, and if he should be, that section is sufficient for his defence; but that has nothing to do with his property. . . . I think there is no inconsistency in holding that the debtor is personally discharged from every demand upon him, but at the same time is bound to fulfil all the obligations incurred with respect to his property." The principle of the bankruptcy laws is, and always has been, to leave securities on property untouched: Eden's Bankrupt Law, p. 284, 2nd ed.

[BLACKBURN, J. Is not this a mere licence, and not like the covenant in *Holroyd v. Marshall*? (1)]

C. Russell, Q.C., for the plaintiff. The discharge under this liquidation, which it is admitted is equivalent to a discharge in bankruptcy, revoked the deed altogether; but even if it did not ipso facto revoke the deed, the debt, it is admitted, is absolutely gone, being released by the discharge; and the deed by its terms is only operative so long as the debt lasts; it is only to be operative so long as any money is secured by or recoverable under it. In *Lyde v. Mynn* (2), the covenant to charge after-acquired property was treated as a separate security or charge. Here there was and could be no charge on after-acquired property without something more: *Carr v. Aeraman* (3); and before the seizure by defendant the liquidation had intervened.

Bruce, in reply. The clause as to after-acquired property is, that the deed shall be taken to apply to it so long as this security continues. The security continues notwithstanding the debt is released.

The judges retired for consultation.

On their return into court,

BLACKBURN, J. We think that the plaintiff is entitled to judg-

(1) 10 H. L. C. 191; 33 L. J. (Ch.)

(2) 4 Sim. 505; 1 My. & K. 683.

193. *Office MS. 213.*

(3) 11 Ex. 566; 25 L. J. (Ex.) 90.

1872

THOMPSON

v.

COHEN.

ment. The plaintiff executed a mortgage of all his goods as a security for the repayment of a debt of 52*l.*, the plaintiff the mortgagor remaining in possession, with a provision giving the defendant the mortgagee liberty to seize the goods from time to time until the debt and costs were satisfied, and on default to sell. And at the end of the deed there was this further term, "It is agreed and declared that if the mortgagor shall, at any time during the continuance of this security, become possessed of any household furniture, and other goods other than or in addition to the said property, the same shall be in all respects subject to these presents, and may accordingly be seized, sold, and disposed of, in the same manner as if the same were now possessed by the mortgagor, and were duly assigned to the mortgagee by these presents." The effect of the deed, therefore, was, that certain specified property was actually conveyed, and the defendant might during the continuance of the security have entered and seized and sold those goods for the purpose of paying off the debt. The subsequent clause gave no right of property in any particular goods, it could only operate as an authority to seize; and when the defendant did seize, the plaintiff's affairs had been arranged under the liquidation clauses of the Bankruptcy Act, 1869, which had the same operation as if he had been adjudged bankrupt under that Act. This case is therefore distinguishable from *Lyde v. Mynn* (1), which was much pressed, and properly pressed, upon us. In the present case, the mortgagor having executed the above deed, filed a petition for liquidation, which, as I have already said, had the same effect as if he had become a bankrupt, and by operation of the liquidation he was discharged from the debt altogether, the debt was in fact gone; the word used is "released" from the debt. After that some friends gave him some property; it is no matter, however, how the plaintiff acquired the goods, and the defendant professed to enter and seize by virtue of his deed of mortgage. Now the debt to secure the repayment of which the mortgage had been given was altogether gone, for it is clear the plaintiff was released from this debt of 52*l.*, and it does but seem reasonable that, if the debt is gone, the creditor's right to seize in respect of it should be

(1) 4 Sim. 505; 1 My. & K. 683.

1902D348

gone also. It is said, however, on behalf of the defendant, although the plaintiff is discharged or released from the debt, yet when a creditor has a mortgage security, that and the right to make it available are not taken away; and it is quite true that it would require express enactments to take away a vested interest of a creditor, whether legal or equitable; and the Bankruptcy Acts do protect securities. The question, therefore, is, whether the deed in the present case is not altogether different from that in *Lyde v. Mynn*. (1) In *Lyde v. Mynn*, A. granted an annuity to B., and covenanted that if his wife left him any property he would charge it with the annuity. The annuity became discharged by A.'s bankruptcy, and the wife afterwards died, leaving him property. Shadwell, V.C., and Lord Brougham, C., thought the covenant was a security which was not discharged by the bankruptcy; and though it was argued (and I think there is a good deal in the argument) that the debt being discharged the covenant to secure it was also gone, this argument was overruled. It is sufficient to say that the precise point does not arise in the present case, as there is no covenant to transfer, or anything amounting to an equitable mortgage like the case of *Holroyd v. Marshall*. (2) Here is a simple licence to seize after-acquired goods for the purpose of selling them and discharging the debt, and the debt being gone we think the collateral licence to seize goes with the principal debt. There must, therefore, be judgment for the plaintiff.

1872
THOMPSON
v.
COHEN.

MELLOR, J. I am of the same opinion, and I have nothing to add to the judgment of my Brother Blackburn; but I have to say that we have considered the case of *Cole v. Kernot* (3) together with this case, and the Court are all satisfied that the two cases are identical in principle, and the rule therefore in that case must be discharged.

194 D.

LUSH, J. I am also of the same opinion. This case is distinguishable from *Lyde v. Mynn*. (1) The present is not the case of an independent covenant, it is simply a covenant that it shall be

(1) 4 Sim. 505; 1 My. & K. 683. (2) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

(3) See note at end of the case.

1872 lawful for the defendant to seize after-acquired goods if the debtor
 THOMPSON fail to pay the debt; and the debt being gone, the covenant
 v. falls with it.
 COHEN.

HANNEN, J., concurred.

Judgment for the plaintiff.

Attorney for plaintiff: *H. G. Field.*

Attorneys for defendant: *Chinery & Aldridge.*

May 8, 1872. *Cole v. Kernot.*

Aut. 583. DECLARATION for breaking and entering the house and shop of plaintiff, and for
 seizing and taking plaintiff's goods, and disposing of them to defendant's use.

MAR 4 1872 Pleas: Not guilty; leave and licence; and that the goods were not plaintiff's.

19th Dec 1871 At the trial, before Willes, J., at the Winchester Summer Assizes, 1871, the
346-8350 following facts (inter alia) were proved in evidence:—By indenture of the 18th
353 of August, 1868, executed between the plaintiff and H. R. Hooper, the plaintiff,
21st Dec 1871 in consideration of the loan of 200*l.*, and for securing the payment thereof and
 interest, assigned to Hooper (inter alia) all and singular the household furniture,
 stock-in-trade, goods, chattels, effects, and things which are now or which may
 during the continuance of this security, by substitution or otherwise, be in and
 about or belonging to the messuage and premises now occupied by plaintiff, and
 known as 23, High Street, West Cowes, and at No. 113, High Street, West Cowes,
 or in or about any other place or places that the same may now or at any future
 time or times be removed to or placed or deposited in . . . to hold to Hooper,
 his executors, administrators, and assigns, as their own property, subject to the
 proviso for redemption hereinafter contained. Provided always, and it is hereby
 agreed and declared between the said parties that in case the plaintiff shall and
 do, on demand in writing given him or sent to him at his said house or elsewhere,
 well and truly pay to Hooper the said sum of 200*l.*, with interest thereon, at the
 rate of 8*l.* per cent. per annum in the mean time, Hooper shall and will at the re-
 quest and costs of plaintiff re-assign to him the effects hereby assigned, but if
 default shall be made in payment of the money to Hooper in manner hereinbefore
 mentioned, or any interest thereon, or any part thereof, or if the property, or any
 part thereof, be seized under writ or other process, or if plaintiff shall die or be-
 come bankrupt, or execute an assignment of his estate, or make any composition
 for benefit of his creditors, then in either of such cases it shall be lawful for
 Hooper to enter upon any messuage, &c., upon which the said property hereinbe-
 fore mentioned and hereby assigned, or any part thereof, shall be placed or
 deposited, and to take and remove the same, and to sell the said property by
 public auction or private contract, and to hold the proceeds in trust to pay all
 costs, &c.; in the next place, to pay Hooper the 200*l.* and interest due, and the
 surplus, if any, in trust for plaintiff. Provided always, and it is hereby agreed
 and declared that until default shall be made upon demand as aforesaid, or until

any event as aforesaid shall happen, it shall be lawful for the plaintiff to hold possession and enjoy the said effects hereinbefore assigned; and the plaintiff doth covenant and agree that he will, on demand as aforesaid, well and truly pay unto Hooper the said sum of 200*l.*, together with interest at 8*l.* per cent. per annum.

This bill of sale was duly registered.

In April, 1869, the defendant offered to advance the plaintiff the 200*l.* at 5 per cent., and accordingly the defendant paid Hooper off, and by an indenture between Hooper and defendant of the 26th of April, 1869, in consideration of 200*l.* and interest advanced by defendant, Hooper assigned the premises assigned by the indenture of the 18th of August, 1868, and all securities for the same, with power to defendant in the name of Hooper to sue for, receive and give receipts for the said premises, subject to the existing equity of redemption under the indenture of 1868.

By an agreement, in writing of the same date, between the plaintiff and defendant, reciting the deed of 1868, and the above deed of April, 1869, the plaintiff agreed to hire the goods, &c., of defendant and to pay defendant 6*l.* 5*s.* per month "until the sum of 200*l.* interest and expenses are paid, or to pay it off whenever he finds he can do so, with the interest then due, and at which time defendant agrees to give up all claim to the goods, chattels, and effects, &c., and that the same shall then become the property of plaintiff; but upon default being made in payment of the said monthly sum of 6*l.* 5*s.*, or any part thereof, as above stated, I (the defendant) agree that in case of any default to give the plaintiff a fortnight's notice of his said instalment then due; and I (the plaintiff) hereby agree that all moneys paid by me before such default shall be applied by defendant in part payment of the said sum of 200*l.* and interest then due, and to the said goods, &c., and to which from such default the defendant shall have power to sell the same without hindrance by me, and to pay himself the balance with interest and expenses which shall then be due, and hand over the balance, and that the plaintiff to keep up the stock: and that I will not remove the said goods, &c., from off my present dwelling without the consent of the defendant, as I hereby declare that the said goods, &c., shall remain the property of the defendant until the said sum of 200*l.* with interest shall be fully paid and satisfied." [This agreement is set out in terms.]

On the 8th of May, 1869, the plaintiff petitioned under the Bankruptcy Act, 1861, and was adjudged bankrupt, the defendant some days prior having taken possession of all the goods, &c., on the premises under the bill of sale. The plaintiff received his discharge in bankruptcy on the 19th of July, 1869; in the mean time the defendant, after fourteen days possession, withdrew, leaving everything in plaintiff's possession. The plaintiff paid the monthly instalments of 6*l.* 5*s.* for some time. But differences arose, and in February, 1870, defendant put two men in possession. The men afterwards withdrew, and the plaintiff fastened up the house; but on the 3rd of March defendant broke it open, seized all the goods on the premises, and sold them. Upon which the present action was brought.

The learned judge directed the jury, *inter alia*, that the defendant had no right, under his bill of sale, to seize any property acquired by the plaintiff since his order of discharge, the learned judge expressing it as his impression that the effect of the plaintiff's discharge in bankruptcy was to get rid of the collateral security for the debt which was absolutely barred by the order of discharge in bankruptcy.

The jury having found a verdict for the plaintiff, *inter alia*, for the value of the

1872

THOMPSON
v.
COHEN.

1872

THOMPSON

v.

COHEN.

after-acquired goods, a rule was obtained for a new trial, inter alia, on the ground of the above alleged misdirection.

May 8. *H. T. Cole, Q.C.*, and *R. D. Bennett*, shewed cause, and contended that, assuming the defendant to have been otherwise in a position to seize under his bill of sale, the bankruptcy of the plaintiff intervened and prevented his title. The grant or licence to seize after-acquired goods conferred no title without some further act: *Lunn v. Thornton*. (1) Here the seizure was not till after the bankruptcy, which distinguished the case from *Hope v. Hayley* (2); see also *Wood v. Leadbitter* (3), and *Wood v. Manley*. (4) By ss. 151 and 161 of the Bankruptcy Act, 1861 (21 & 25 Vict. c. 134) the debt was absolutely gone, not only the remedy barred, and any collateral remedy must be gone too: *Van Sandau v. Corsbie* (5); *Davis v. Shapley* (6); *Carr v. Acraman*. (7) The seizure could only be justified under the terms of the deed, and if the debt was gone there could be no default in payment.

G. Lewis, in support of the rule, contended that the authority to seize being given for a good consideration was irrevocable: 2 Wms. Notes to Saunders, 414; *Andrews v. Palmer* (8); *Taylor v. Marling*. (9) The bankrupt was discharged from the debt, but the debt was not extinguished: *Trueman v. Fenton* (10); Bac. Abr. Bankrupt (N.); *Betteley v. Stainsby* (11); *Newton v. Scott* (12); and if the debt still existed, then there was a default within the terms of the deed, although the debtor was only morally bound and not legally. The security remained, although the debt be barred by the bankruptcy: *Lyde v. Mynn*. (13)

Cur adv. vult.

May 10. The Court (Cockburn, C.J., Mellor and Lush, JJ.) discharged the rule: See the judgment of Mellor, J., ante, p. 533.

Rule discharged.

Attorney for plaintiff: *Stephen Scott*.

Attorney for defendant: *A. Greaves*.

(1) 1 C. B. 379.

(2) 5 E. & B. 830; 25 L. J. (Q.B.) 155. *29th MS. 486*

(3) 13 M. & W. 845, 855.

(4) 11 A. & E. 34.

(5) 3 B. & Ald. 13.

(6) 1 B. & Ad. 54.

(7) 11 Ex. 566; 25 L. J. (Ex.) 90.

(8) 4 B. & Ald. 250.

(9) 2 Man. & G. 55.

(10) Cowp. 544.

(11) Law Rep. 2 C. P. 568.

(12) 9 M. & W. 434; 10 M. & W. 471.

(13) 4 Sim. 505; 1 My. & K. 683.

NORRIS AND OTHERS, APPELLANTS; BARNES, RESPONDENT.

1872

May 1.

Sanitary Act, 1866 (29 & 30 Vict. c. 90). part 2, ss. 14, 19—Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), ss. 12, 44—Smoke or other Nuisance in Manufactory of Product of Ores and Minerals.

Rule 470

By s. 14 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90), part 2 of that Act is to be construed as one with 18 & 19 Vict. c. 121. By s. 19 "nuisances" under the above Act shall include any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the combustible used in any mill, factory, dyehouse, brewery, bakehouse, or gasworks, or in any manufactory or trade process whatsoever. Any chimney (not of a private dwelling) sending forth black smoke in such quantity as to be a nuisance. By s. 8 of 18 & 19 Vict. c. 121, certain things are defined as nuisances; and by s. 12, proceedings may be taken by the local authority before justices to abate nuisances ascertained to exist; and by s. 44 of that Act, "the provisions of this Act shall not extend or be construed to extend to mines of different descriptions, so as to interfere with or obstruct the efficient working of the same, or to the smelting of ores and minerals, or to the manufacturing of the produce of such ores and minerals."

Held, by Blackburn and Mellor, JJ. (Lush, J., dissenting), that, construing the two Acts as one, as required by s. 14 of the later Act, the proviso in s. 44 of the earlier Act must apply to all nuisances in s. 19 of the later Act as well as to nuisances in s. 8 of the earlier Act; so that works for the manufacturing of the produce of ores and minerals are entirely exempt from the operation of the two Acts; and that, therefore, justices had no jurisdiction to order the abatement of smoke issuing out of the chimney of a bichrome manufactory.

CASE stated under 20 & 21 Vict. c. 43, by Justices of the West Riding of Yorkshire.

By s. 14 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90) part 2, "The expression 'Nuisances Removal Acts,' shall mean 18 & 19 Vict. c. 121, and 23 & 24 Vict. c. 77, as amended by this part of this Act; and this part of this Act shall be construed as one with the said Acts. . . ."

By s. 19, "The word 'nuisances' under the Nuisances Removal Acts shall include—1. Any house or part of a house so overcrowded as to be dangerous or prejudicial to the health of the inmates; 2. Any factory, workshop or workplace not already under the operation of any general Act for the regulation of factories or bakehouses, not kept in a cleanly state, or not ventilated in such a manner as to render harmless as far as practicable any gases, vapours, dust, or other impurities generated in the course of the work carried on therein, that are a nuisance, or injurious, or dangerous to health, or so overcrowded while work is carried on as to be dangerous or prejudicial to the health of those employed therein; 3. Any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the combustible used in such fireplace or furnace, and is used within

1872

NORRIS
v.
BARNES.

the district of a nuisance authority for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufactory or trade process whatsoever. Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance."

"Provided, . . . secondly, that where a person is summoned before the justices in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the justices may hold that no nuisance is created within the meaning of the Act, and dismiss the complaint if they are satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof."

Port 550
By 18 & 19 Vict. c. 121, s. 8, "The word 'nuisances,' under this Act, shall include any premises in such a state as to be a nuisance or injurious to health. Any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ashpit so foul as to be a nuisance or injurious to health. Any animal so kept as to be a nuisance or injurious to health. Any accumulation or deposit which is a nuisance or injurious to health."

For s. 12, see ante, p. 476, n. (1).

By s. 44, "Nothing herein contained shall enable any local authority, manager of highways, or other person, either with or without any order of justices, to injuriously affect the navigation of any river or canal, or to divert or diminish any supply of water of right belonging to any such river or canal; and the provisions of this Act shall not extend or be construed to extend to mines of different descriptions, so as to interfere with or obstruct the efficient working of the same, or to the smelting of ores and minerals, or to the manufacturing of the produce of such ores and minerals."

On the 13th of June the appellants were summoned to answer the complaint of the respondent, for that they the appellants, on the 3rd of June instant, at, &c., "unlawfully did send forth black smoke from a certain chimney belonging to certain premises called 'Calder Works,' in the occupation of the appellants (not being the chimney of a private dwelling-house), in such quantity as to be a nuisance, contrary to the statute.

It was proved, on behalf of the respondent, that black smoke did issue from the said chimney on the day in question, at different intervals, for periods of time amounting altogether to twenty-eight minutes of the one hour during which it was watched, in such a quantity as to be a nuisance; that "Calder Works" were in the occupation of the appellants, and that the premises were used as a manufactory and not as a private dwelling-house.

On the part of the appellants it was proved that the chimney complained of communicated with four furnaces, which were all

used solely for the manufacture of bichrome, and that bichrome is the product of ores and minerals.

1872

 NORRIS
v.
BARNES.

[Evidence was then set out as to whether or not the furnaces were constructed so as to consume the smoke, as far as practicable; but the judgment of the Court renders it unnecessary to give this evidence.]

It was contended on the part of the appellants that the justices ought not to make any order upon the summons, but ought to dismiss the complaint for the reasons: First, that the manufactory carried on by means of the chimney which sent out the black smoke was a manufactory of the produce of ores and minerals, and therefore did not come within the Acts in question; secondly, that the furnaces were constructed in such a manner as to consume the smoke as far as practicable.

On the part of the respondent it was contended that the information being laid under the latter part of subs. 3, of s. 19 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90), neither the previous part of s. 19, nor the second proviso to the said section applied to this information.

Being satisfied by the evidence, on the part of the respondent, that black smoke was on the day in question sent forth from the said chimney in such a quantity as to be a nuisance, and that the same might be prevented by the use of coke as a combustible, and being of opinion that, notwithstanding the second proviso in s. 19 of 29 & 30 Vict. c. 90, and s. 44 of 18 & 19 Vict. c. 121, the appellants were not justified in committing so serious a nuisance for the sake of profit more or less, the justices made an order upon the appellants for the abatement of the nuisance.

The question for the Court was, whether the justices ought, upon the evidence laid before them by the appellants, to have dismissed the complaint. If the Court should be of opinion in the affirmative the order was to be quashed; if in the negative, then it was to stand and to be carried into effect.

Manisty, Q.C. (Beresford with him), for the appellants. If s. 19 of the new Act stood alone, it must be conceded that the appellants *prima facie* come within its operation, as their chimney did, according to the finding of justices, send forth smoke so as to be a

1872
NORRIS
v.
BARNES.

nuisance. But by s. 14, the second part of the Act is to be construed as one with 18 & 19 Vict. c. 121; and so reading them, the proviso in s. 44 of the original Act must be read as a proviso on s. 19, and then the appellants' works, being for the manufacturing of bichrome, which is a product of ore and minerals, are altogether exempt from the provisions. That this was intended, is corroborated by the similar exemption in the Local Government Act (21 & 22 Vict. c. 98, s. 45.)

Field, Q.C. (R. G. Williams with him), for the respondent. If s. 44 of the old Act is to override s. 19 of the later Act, then after enacting that certain things, such as overcrowding, want of ventilation, &c., in any factory, or workshop, or the smoke from any manufactory or trade process whatsoever, shall be nuisances to be summarily abated, the legislature must be taken to have exempted entirely every kind of working in metals. Nothing can be more absurd than to suppose this could be intended. It is a much more reasonable construction of the two Acts, though treating them as one, as s. 14 of the new Act directs, to read s. 44 as a proviso as to the nuisances in s. 8, and then to read s. 19 as coming after s. 44, and saying the cases therein mentioned shall be nuisances and dealt with accordingly.

[BLACKBURN, J. Unfortunately s. 12 of the old Act is the only section applicable to the justices' jurisdiction, and that comes before s. 44, so that you must read s. 8 and s. 19 as together saying what nuisances shall be dealt with by the justices, and then s. 44 comes as a proviso upon the whole.]

Manisty, Q.C., in reply.

BLACKBURN, J. The question lies in a very small compass, but is one of no small difficulty; however, I think we should gain nothing by taking time to consider it, although we are not all agreed. My opinion is, that the appellants are right, and that in the way the Acts have been passed and drawn, and looking at the provisions of the two Acts, we cannot say that the magistrates have power given them by the legislature to proceed summarily under s. 12 of the earlier Act and order an abatement of the nuisance when it is created in the manufacture of the product of ores and minerals.

The first Act is 18 & 19 Vict. c. 121. By s. 8 the word "nuisances" under this Act was to include certain things, the last only of which was at all likely to apply to the manufacture of the produce of ores and minerals, namely, "any accumulation or deposit which is a nuisance or injurious to health;" and probably therefore the legislature put in words exempting manufactories of the produce of ores and minerals, because, as we know, there are a great many works, alum works for instance, in which there are accumulations of refuse, which are a nuisance to the neighbourhood, particularly if they get into a stream, but which are indispensable in carrying on the works. The Act having said in s. 8 that "nuisances" shall include certain things, proceeds to enact in s. 12 that when a nuisance has been ascertained by the local authority to exist the justices may proceed summarily to order its abatement. Then comes s. 44. [The learned judge read the section.] I think it is impossible in construing that Act as it originally stood by itself, not to see that the effect of the proviso is to say that that part of the Act which gives power to the justices to interfere shall not apply to the smelting of ores and minerals and to the manufacturing of the produce of such ores and minerals, because the only nuisance under the Act which could arise from such works would be from the deposit of heaps such as I have mentioned.

Then comes the Public Health Act (29 & 30 Vict. c. 90), which, no doubt, was intended to meet quite a different class of things from the former Act. But, unfortunately, the mode in which the legislature has proceeded is this: First, they say, in s. 14, that this Act shall include the Nuisances Removal Acts, one of which is 18 & 19 Vict. c. 120, and this part, that is, part ii. of this Act, shall be construed as one with the said Acts. That alone would not have enabled justices to deal with more than they could before; but then s. 19 says the word "nuisances," under the Nuisances Removal Acts, shall include:—[The learned judge read s. 19, subss. 1-3]. The two Acts being thus to be read as one, the things mentioned in s. 19 are to be read as understood in the word "nuisances" in s. 8 of 18 & 19 Vict. c. 121. Then s. 12 of that Act (for there is no other section under which jurisdiction is given to justices to abate the nuisance) must be taken to apply to

1872

 NORRIS
v.
BARNES.

1872

NORRIS
v.
BARNES.

what I may call the new nuisances, as well as to the old nuisances under the original Act. And then follows s. 44, which says, "The provisions of this Act," which is to be construed as one with the second part of the new Act, "shall not extend, or be construed to extend, to mines of different descriptions, so as to interfere with or obstruct the efficient working of the same, or to the smelting of ores and minerals, or to the manufacturing of the produce of such ores and minerals." What the respondent asks us to do, and which I think we should be bound to do but for this proviso, is, to apply the provisions of this Act to preventing black smoke being emitted from this factory. I quite agree that it seems absurd enough that any manufactory of the produce of ores and minerals shall be at liberty to send out black smoke in any quantities; but it becomes still more obviously absurd, if, while the statute says that when any works are so overcrowded as to be dangerous to health, the magistrates shall interfere and deal with them as a nuisance, yet any manufactory of the produce of ores and minerals may be as crowded as the owners please. But, nevertheless, this is the way the legislature have chosen to enact, they tell us to apply the provisions of 18 & 19 Vict. c. 121, not only to the nuisances under that Act, but to the nuisances created by the subsequent Act, and to read the two Acts as one. Then we find there is a general proviso in the first Act which exempts manufactories of the produce of ores and minerals from the provisions of the Act. I cannot think that the legislature intended that such manufactories should be excluded altogether from the operation of the Acts; but I am sorry to say that I am driven to the conclusion that they have said it. The Acts are to be read as one, and, the legislature having chosen so to enact, we have to construe them as one, and doing so, I think the legislature have prevented the justices from having any summary jurisdiction over the manufactories of the produce of ores and minerals, whether the nuisance arises from chimneys emitting black smoke or from the rooms being overcrowded or otherwise, within s. 19. If the legislature, which I can but suppose is the case, did not intend this, it is for them to amend the Act.

MELLOR, J. I am of the same opinion. By s. 44 of 18 & 19

Vict. c. 121, it is enacted in effect that the justices, in the exercise of their summary jurisdiction, are not to interfere with the efficient working of mines, and it would seem a very reasonable provision to say that the proviso should extend to the smelting of ores and minerals; but the proviso goes much further, and exempts entirely from the provisions of the Act not only the smelting of ores and minerals, but the manufacturing of the produce of ores and minerals. The effect of the new Act is simply to extend the operation of the old Act to certain specific "nuisances" named, and the proviso in s. 44 is left untouched. I do not think that the legislation is much more absurd now than it was when the first Act stood alone, when, beyond all question, it was intended to exempt entirely the smelting of ores and minerals, and the manufacturing of the produce of ores and minerals.

1872

 NORRIS
v.
BARNES.

LUSH, J. I have arrived at a different conclusion from that to which my learned Brothers have come, but I express it with diffidence, seeing that they have so clear an opinion upon the point. It does not appear to me that the language the legislature has used obliges us to put a construction on the statute which is manifestly at variance with the obvious intention; because I take it to be clear from the comprehensive language of s. 19 that the legislature did not intend to exempt any manufactory whatever from the operation of 29 & 30 Vict. c. 90, in respect of the matters which are thereby declared to be nuisances. Have they used words which oblige us to put a different construction on the enactment from what we must presume to have been the intention? I think not. It strikes me that the words may well be construed so as to carry out the obvious intention of the legislature. In 18 & 19 Vict. c. 121, s. 8, the nuisances are these: "any premises in such a state as to be a nuisance or injurious to health; any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ash-pit, or any accumulation or deposit which is a nuisance or injurious to health." It is with reference to that class of nuisances that the 44th section is enacted, nuisances which may be unavoidable in smelting and such like operations. The 29 & 30 Vict. c. 90, after saying by s. 14 that the second part of the Act shall be construed as one with 18 & 19 Vict. c. 121, extends the list of nuisances

1872

NORRIS
v.
BARNES.

by saying (s. 19) that the word "nuisances," under the former Act, shall include things, not necessarily arising from the process or manufacture, but things which may by reasonable care be prevented. [The learned judge read the three clauses of s. 19.] This section is to be read as if it were incorporated in the 18 & 19 Vict. c. 121, but why are we to read it as coming before s. 44? The Act does not say what its place is to be in the 18 & 19 Vict., nor is there a word which directs us to read it as covered by s. 44. I do not therefore see any reason why s. 44 may not be so read as to leave the magistrates full power to deal with the class of nuisances which is really a misuse of the premises, nuisances arising, not from the nature of the work carried on therein, but from the improper and negligent mode of working. The words are that the "provisions of this Act shall not extend or be construed to extend to mines of different descriptions so as to interfere with or obstruct the efficient working of the same, or to the smelting of ores and minerals, or to the manufacturing of the produce of such ores and minerals." It does not say that none of the provisions shall extend to any factory or place in which smelting is carried on; the words do not apply to the place or to the building, but to the operation itself. I am therefore of opinion that we may give effect to every word in the two Acts, and yet hold that the order of the justices is valid.

Judgment for the appellants. (1)

Attorneys for appellants: *Emmets, Watson, & Emmet, for Ingram, Halifax.*

Attorneys for respondent: *Chester & Urquhart, for Clough & Son, Huddersfield.*

(1) See the next two cases.

THE QUEEN *v.* WATERHOUSE AND OTHERS, JUSTICES OF THE WEST
RIDING OF YORKSHIRE.

1872

May 6

Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121)—Sanitary Act, 1866 (29 & 30 Vict. c. 90)—Sending forth Black Smoke—Order of Abatement—Disobedience to—Separate Acts—Single Summons—Multiplication of Costs—Discretion of Justices—Rule to state Case.

Justices acting in pursuance of the Nuisances Removal Act, 1855, and the Sanitary Act, 1866, ordered the occupiers of certain premises to cease to send forth black smoke from their chimney, so that the same should be no longer a nuisance. The order having been persistently disregarded, and the offenders summoned and a penalty imposed on them, under s. 14 of the Act of 1855, for their default, nineteen separate informations were eventually laid, and the same number of summonses simultaneously issued, in respect of as many acts of disobedience, each committed on a different day, by sending forth black smoke. At the hearing of the summonses, the full penalty of 10s. was imposed for the offence alleged in each, and the offenders were ordered also to pay 15s. costs upon the first summons, and 16s. costs upon every other. They objected that their disobedience was but one default, and that the divers acts complained of should have been charged in a single summons, to which one set of costs only would have attached; and they obtained a rule calling on the justices to shew cause why they should not state a case under 20 & 21 Vict. c. 43:—

Held, that each daily emission of smoke was a separate act of disobedience, for which a separate summons might be lawfully issued, and that, under the circumstances, the justices had not so exercised their discretion in awarding costs as to render the interference of the Court necessary.

Semble, that, had they done so, the proper remedy would not be by ruling them to state a case.

RULE calling on certain Justices of the West Riding of Yorkshire to shew cause why they should not state and sign a case or cases for the opinion of the Court pursuant to 20 & 21 Vict. c. 43.

The facts appearing from affidavits used in obtaining and opposing the rule were as follows: Messrs. Eddleston and Briggs were summoned before justices to answer a complaint that they, on the 28th of February, 1871, unlawfully did send forth black smoke from a certain chimney belonging to premises occupied by them (not being the chimney of a private dwelling-house), in such a quantity as to be a nuisance. On the 11th of March, when the summons was returnable, the persons charged did not appear, but the offence was proved, and they were ordered, within one calendar month from the service of the order, to cease to send forth black smoke from the said chimney, so that the same should

Rule 54
18 & 21 Vict. c. 43
70.

1872
THE QUEEN
v.
WATERHOUSE.

be no longer a nuisance or injurious to health. In June six summonses were served upon them for acts of disobedience to the order, committed upon six different days. At the hearing, they appeared, and, after 'proof of the disobedience alleged, were fined 10s. on each summons, and 15s. costs on each summons. In September, eleven similar summonses were served upon them, in respect of separate acts of disobedience to the order, committed on different days of that month respectively. Upon each of these summonses also they were ordered to pay a penalty of 10s. for each day, and 15s. for the costs of each summons. Finally, in December, nineteen such summonses were simultaneously issued, charging disobedience to the order of abatement, on nineteen other distinct days. At the hearing divers objections were taken *inter alia*, that it was contrary to law to lay on the same day nineteen separate informations, and to issue nineteen separate summonses, and make nineteen separate orders, with as many separate sets of costs, for an accumulated penalty, upon the one order of abatement. But the justices overruled the objections imposed a penalty of 10s. with 15s. costs upon the first summons, and upon each of the remaining eighteen summonses a penalty of 10s. and 16s. costs, and refused to state a case.

R. G. Williams shewed cause. (1) It is unnecessary to argue that the justices were bound to issue nineteen separate summonses; but it is enough to say that they were not obliged to include all the offences in one process, and the onus of shewing the contrary rests on the objectors. There is no illegality in this mode of enforcing the order of abatement. The persons committing the nuisance could not have complained if they had been summoned day by day as they offended. Then how are they damnified by the fact of the summonses being issued simultaneously? The full penalty prescribed by the Act is but small, the nuisance here was great, and the defendants were contumacious. Moreover, Jervis's Act (11 & 12 Vict. c. 43), s. 18, (2) gives the justices power to exercise their discretion in awarding costs.

(1) In the Bail Court, before Blackburn and Hannen, JJ.

(2) 11 & 12 Vict. c. 43 (Jervis's Act), s. 18, enacts "that in all cases of sum-

mary conviction or of orders made by a justice or justices of the peace, it shall be lawful for the justice or justices making the same, in his or their dis-

Maule, Q.C., and *F. M. White*, in support of the rule. Disobedience of the order is but one offence, although cumulative penalties may be imposed for it. And that offence was complete at the expiration of a month from the service of the order when the nuisance continued.

1872
THE QUEEN
v.
WATERHOUSE

[BLACKBURN, J. Each emission of smoke on a separate day was a separate offence of disobedience. Just as in a recent case where we held that a parent having been fined for disobeying an order to have his child vaccinated may be proceeded against from time to time so long as the child remains unvaccinated. (1)]

Here the disobedience was in not abating the nuisance within a month. Sect. 14 of 18 & 19 Vict. c. 121 (2), applies to the nuisances of a continuous kind specified in s. 8, viz., "Any premises in such a state as to be a nuisance or injurious to health. Any pool, ditch, gutter, watercourse, privy . . . so foul as to be a nuisance," &c.; and cannot be adapted to an intermittent nuisance, such as sending forth black smoke, which was not in the contemplation of the legislature when that statute was passed, but has been created an offence by the Sanitary Act of 1866 (29 & 30 Vict. c. 90), s. 19, subs. 3. (3) The words used in s. 14 of the earlier statute shew that it relates to a continuing act, "Any person not obeying the order . . . shall be liable for every such offence to a penalty of not more than 10s. per day during his default."

[HANNEN, J. That means during the default arising from each act of disobedience.]

cretion, to award and order, in and by such conviction or order, that the defendant shall pay to the prosecutor or complainant respectively such costs as to such justice or justices shall seem just and reasonable in that behalf." . . .

(1) *Allen v. Worthy*, Law Rep. 5 Q. B. 163.

(2) By 18 & 19 Vict. c. 121 (the Nuisances Removal Act, 1855), ss. 12, 13, justices are empowered to make an order for the abatement of a nuisance in such manner and within such time as in such order shall be specified. Section 14 enacts that "any person not obeying

the said order for abatement shall, if he fail to satisfy the justices that he has used all due diligence to carry out such order, be liable for every such offence to a penalty of not more than 10s. per day during his default." . . .

(3) 29 & 30 Vict. c. 90 (the Sanitary Act, 1866), s. 19, declares that "the word 'nuisances' under the Nuisance Removal Acts shall include any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance."

1872

THE QUEEN

v.

WATERHOUSE.

A power of awarding costs ought not to be used as a means of imposing, in effect, a much heavier penalty than that prescribed.

BLACKBURN, J. I think this rule must be discharged. No doubt the Nuisances Removal Act, passed in 1855 (18 & 19 Vict. c. 121), provided for certain nuisances enumerated in s. 8, which were chiefly of a continuous nature, such as foul pools, ditches, gutters, watercourses, privies, &c. And certainly the language of s. 14 shews that the legislature had continuous nuisances in mind. But then in the later Act of 1866 (29 & 30 Vict. c. 90), s. 19, subs. 3, they chose to enlarge the definition of "nuisance" to include "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance." The justices by their order say, in effect, "Do not in future send forth black smoke from the chimney." They give one month's grace during which the nuisance may be abated, after the expiration of that period the order comes into operation, and when proceedings are taken under s. 14, and the persons against whom the order was made fail to shew that they have "used all due diligence" to obey such order, it is plain that they have disobeyed each time they sent out black smoke. Here nineteen summonses were issued, carrying nineteen separate sets of costs. The Court granted this rule thinking that the mode of proceeding before the justices was oppressive, and was adopted not merely to recover penalties, but to much increase them by multiplying costs; and I believe that, in point of fact, was the object of the numerous separate summonses. *Primâ facie* that would certainly seem to be very oppressive. But it now appears that the justices are entrusted by the legislature with a power to exercise discretion as to costs, and if the present had been simply an ordinary case of an informant taking out nineteen summonses at once for nineteen offences on as many successive days, I have no doubt that the justices would only have allowed one set of costs. But we find that the offenders obstinately persisted in sending forth black smoke, notwithstanding the order of abatement. They were charged with having done so, first, on six occasions, again, on eleven, and, lastly, on these nineteen different days. The justices were naturally influenced by such conduct, and although my own opinion is that

they would have exercised their discretion in a better manner by saying to the informant, "If the penalty is too small to be effective parliament must interfere, but we will only grant the costs which will cover the expense incurred in an ordinary way," yet it is quite clear that where there were contumacious offenders, as in this instance, there was nothing obviously oppressive in what was done, such as to call for the interposition of the Court; and, even if there had been, I cannot think that this attempt to make the justices state a case would have been the proper remedy.

HANNEN, J. I am of the same opinion. I think that the only question is on s. 14 of 18 & 19 Vict. c. 121, whether there can be a repetition of the offence of disobeying the order; and it is to my mind exceedingly plain that there can. In this case there was such a repetition on every occasion when the owners of the chimney permitted it to send forth black smoke so as to be a nuisance. Then the statute provides that a penalty may be imposed for every offence, not exceeding 10s. per day. I think the effect of that provision is that each daily emission of black smoke, after the order of abatement came into force, may be treated as a distinct offence to which a penalty may be attached, although, of course, the offending parties never could be fined more than 10s. a day. The only remaining point is, whether or not for two distinct offences two separate summonses may be taken out. It has been argued that it cannot be done. Here nineteen summonses were issued; but the complaint of the persons summoned only raises a question as to whether the justices rightly used their discretion as to costs, and that is not a matter of law. We can account for the mode in which such discretion was exercised, when we find that sufficient warning had been given to the owners of the premises by the previous proceedings against them, and yet they remained contumacious. I would add that I do not wish to give an opinion upon a point which it is unnecessary to decide, but, at present, I incline to think that compelling the justices to state a case would not be the proper form in which to raise this question.

Rule discharged with costs. (1)

Attorneys for prosecution: *Bower & Cotton.*

Attorneys for defendants: *Chester & Urquhart.*

(1) See the next case.

1872
June 1.*

THE GREAT WESTERN RAILWAY COMPANY, APPELLANTS; BISHOP,
RESPONDENT.

Nuisance—Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), s. 8.

By s. 8 of 18 & 19 Vict. c. 121, the word "nuisances" shall include any premises in such a state as to be a nuisance or injurious to health. The appellants were the owners of a railway bridge over a highway. The rain-water collected on the bridge, and, running through the planks, dripped on to the highway and on persons using the highway. The appellants were summoned, under s. 12 of the above Act, for allowing a nuisance to exist on their premises, and the justices ordered its abatement:—

Held, that the Act, being a sanitary Act, applied only to such nuisances as were injurious to health; and that as the nuisance complained of was not injurious to health, the justices were wrong in ordering its abatement.

CASE stated by Justices of Aberavon, under 20 & 21 Vict. c. 43.

A complaint was preferred by the respondent, as inspector of nuisances, against the appellants, under s. 12 of the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), (1) for that in and upon the premises of the appellants being a railway bridge situate in Church Street, within the district of the Aberavon Local Board, the following nuisance existed, that is to say, a want of proper and sufficient means to prevent the percolation and overflow of water upon persons passing under or near to the premises, and that the nuisance was caused by the act or default of the appellants.

At the hearing it was proved on the part of the respondent that the bridge, being the property of the appellants, was situate over Church Street, in the borough of Aberavon. That the bottom of the bridge was formed of wooden planks, and that both during rainy weather and for some time afterwards, the water percolated through the bridge on to the street below, insomuch that foot passengers were, even after the rain had ceased, obliged to make use of their umbrellas when passing under the bridge, and that the water, having passed through the bridge, was dirty. That there was nothing under the bridge to prevent the water falling upon the passengers passing along the street, and it was admitted

* Decided in Trinity Term, but same statute for convenience of reported here with the other cases on the reference.

(1) See s. 8, ante, p. 538, and s. 12, ante, p. 476, n. (1).

by the respondent that no water from either side of the bridge flowed on to the bridge itself, being, as a fact, somewhat higher than either side of the railway, and the water so running from the bridge, no rain or other water did or could percolate through the bridge except such as came down from the clouds on to the bridge itself.

It was contended on the part of the appellants:—First, that the percolation of the water through the bridge upon the passengers in the street was not a nuisance within the meaning of the Nuisances Removal Act for England, 1855, inasmuch as it was not injurious to health. Secondly, that the bridge in question did not come within the meaning of the word “premises,” as interpreted by the Act. The justices decided against the appellants, and made an order for the abatement of the nuisance.

The questions for the opinion of the Court are: First, whether it was necessary, on the part of the respondent, to prove that the nuisance complained of was injurious to public health. Secondly, whether the bridge in question came within the meaning of the word “premises,” as interpreted by the Nuisances Removal Act for England, 1855.

Lopes, Q.C. (*Raymond* with him), for the appellants. Water running through the planks of a railway bridge, and falling on persons walking in the street below, is not a nuisance within the Nuisances Removal Act, 1855, as it is not injurious to health. The recital of the Act shews that it was passed to amend the Nuisances Removal and Diseases Prevention Act, 1848, and the Nuisances Removal and Diseases Prevention Amendment Act, 1849, those Acts being defective; it is therefore a sanitary Act, and nuisances to which this Act is applicable are nuisances which affect health. Section 8 defines “nuisances” to be any premises in such a state as to be a nuisance or injurious to health. It is clear that the word “premises,” as defined, means premises in such an unhealthy and foul state as to be a nuisance or injurious to health.

[He was then stopped by the Court.]

Herschell, Q.C. (*J. B. Hughes* with him), for the respondent. The Act intended to give an inexpensive remedy for the abatement of a nuisance such as that complained of, instead of resorting to an indictment, it is therefore not confined to nuisances which are injurious to health. Any nuisance within the four heads given in s. 8 is within the Act. This case falls within the first head of

1872

GREAT
WESTERN
RAILWAY Co.
v.
BISHOP.

1872
GREAT
WESTERN
RAILWAY CO.
v.
BISHOP.

that section. The words are in the alternative, and the meaning is, that all premises in such a state as to be a nuisance, or in such a state as to be injurious to health, may be proceeded against under s. 12, and the words of s. 13 which provide the means of getting rid of a nuisance are large enough to give a remedy for all nuisances. Sections 12 and 13 are not confined to public premises, but all premises which have an owner or occupier, and therefore include private premises.

COCKBURN, C.J. I think this conviction cannot be upheld, and I regret it, for I think that it would be very convenient and very useful that there should be a summary jurisdiction in such a case; but that it would be convenient that there should be a summary jurisdiction is not sufficient. We must not act upon any such motive of public convenience where we are construing an Act of Parliament, unless we see the construction that would carry out such a public object is warranted by the language of the statute. The Act speaks of nuisances or things injurious to health, and I think that the distinction taken by Mr. Lopes is the true one, that it was intended for the benefit of public health or health generally, to secure the means of abating things that were either matters of public or private nuisance, of public nuisance as coming within the word "nuisance," and private nuisance as coming within the words "injurious to health;" but whether you regard public or private nuisance, still it was intended that the powers of this Act should apply only when the thing complained of was injurious to health. It was admitted that this Act cannot be considered as comprehending within its provisions all things which would amount to nuisances in point of law. 'Obstructions to a highway and a variety of other offences of that kind against public convenience, which are in point of law nuisances, never can have been intended to be within the scope of this legislation. It becomes therefore necessary to draw a line somewhere. We can only discover that line by reference to the evident scope and purpose of the enactment. It is plain that the object was to protect the public health and private health of individuals living in towns, or in the neighbourhood of towns. I think that affords us a guiding principle by which to construe this Act, and that "nuisance," the general term used in the Act, must be taken to mean a nuisance affecting public

health. We have then to say whether this is a nuisance of that description. I cannot but think that it amounts to a very serious annoyance and inconvenience to persons who have to pass under the bridge, and that annoyance and inconvenience is one which they ought not to be subject to. I pronounce no opinion whether it would be indictable at common law. Possibly it might be so. However, although this may be a nuisance at common law, it is not a nuisance within this statute, because it is not a nuisance that can be said to affect public health, except in a very indirect and remote manner, not such as could be contemplated by the Act of Parliament. The statute is intended evidently to prevent all those nuisances which arise from slaughter-houses and accumulations of refuse matter, and a variety of other injurious or obnoxious trades which are a nuisance to the public, and cannot be taken to apply to such a case as the present.

1872

GREAT
WESTERN
RAILWAY CO.
v.
BISHOP.

LUSH, J. I think it clear the words used in s. 8 are not used in their ordinary legal sense as denoting everything which is the subject of an indictment at common law. But they must receive some limitation. Instances may be put of nuisances which are clearly beyond the province of this Act, as obstructing a highway or keeping an unruly bull in a field in which there is a public footpath; then if the word nuisance in the Act must be limited, I can see no other guide to its construction than by referring to those wrongful acts spoken of by the statute, viz., injuries to health.

HANNEN, J. I am of the same opinion. I think by the peculiar language used in s. 8, namely, that the word "nuisances shall include any premises in such a state as to be a nuisance or injurious to health," it was intended to extend the operation of this Act not merely to cases in which there would be a nuisance in the ordinary sense of the word, that is, something obnoxious to the public, but also to those cases where although there is no injury to the public the thing complained of is injurious to the health of the inhabitants of a house, and therefore a private injury.

Judgment for the appellants.

Attorneys for appellants: *Young, Maples, Teesdale, & Co.*

Attorneys for respondent: *Norris, Allens, & Carter.*

1872

WELLS v. ABRAHAMS.

May 2.

Action—Civil or Criminal Proceeding—Practice—Trespass—Felony—New Trial.

In an action of trover and trespass for a brooch, the pleas being not guilty and not possessed, the jury found a verdict for the plaintiff. A rule for a new trial having been obtained, on the ground that it appeared from the evidence that the brooch was taken by the defendant under such circumstances as to prove a charge of felony, and that the judge ought, therefore, to have nonsuited the plaintiff:—

Held, that the judge was bound to try the issues on the record, and that he was right in not having nonsuited the plaintiff.

FIRST count, trover for a gold brooch; second count, for seizing and taking away the plaintiff's gold brooch.

Pleas: 1. Not guilty; 2. Not possessed.

At the trial before Lush, J., at the spring assizes, 1872, at Liverpool, the following facts were proved. The plaintiff, being desirous of obtaining a loan of 500*l.* from the defendant, on the security of certain jewelry, the plaintiff's wife took to the defendant's shop a packet containing, amongst other jewelry, a gold brooch, valued at 150*l.*, and left it with the defendant. The parties not having come to terms, the defendant returned the packet to the plaintiff's wife, who, on opening it a few days after, discovered that the brooch was not in it. She immediately wrote to the defendant, and charged him with having abstracted the brooch from the packet. The defendant and his son both gave evidence that the brooch was in the packet when it was returned to the plaintiff's wife, and the defendant denied that he had taken it.

The jury found a verdict for the plaintiff for 150*l.*

A rule was obtained for a new trial, on the ground that the evidence tended to prove a felony; and also on the ground of the subsequent facts to the trial, viz., that a criminal prosecution, for the felonious stealing of the brooch, alleged to have been converted in the action, is pending, as in the affidavits mentioned.

The affidavit of the defendant stated that, after the action, the plaintiff instituted criminal proceedings against the defendant, in respect of the same matters which were the subject of the action,

SLC 89
90,
10CLD.668
671-4.
6QBD 573-5
20CLD 132
10QBD 413

and that the plaintiff had never treated the conversion as a larceny until after he had obtained the verdict. The defendant also denied that he had converted the brooch, or committed any larceny of the brooch.

1872

WELLS
v.
ABRAHAM.

Aspinall, Q.C., shewed cause. The contention on the other side will be that, where the evidence at the trial of a cause shews that a felony has been committed in respect of the subject-matter of the action, the civil remedy is suspended until public justice has been satisfied by a criminal prosecution, and that the judge was bound to nonsuit the plaintiff: *Wellock v. Constantine* (1) will be cited as an authority for this proposition; the Court, however, in that case were not unanimous. Martin, B., dissented from the majority, and Channell, B., gave no judgment. The utmost, however, that that case decides is that the judge may, not that he is bound, to nonsuit. The plaintiff cannot be nonsuited without his consent; and if he refused to be nonsuited, on what issue is the verdict to be entered for the defendant? The only pleas on the record are not guilty, and not possessed. The defendant has not pleaded that he has been guilty of a felony, and that the action is suspended until the felony has been tried. It is very doubtful if he could plead such a plea, but assuming that he could, he has not done so. It would, however, seem, from the judgment of Pollock, C.B., in *White v. Spettigue* (2), that such a defence ought to be pleaded.

[COCKBURN, C.J. The judge at nisi prius is merely a commissioner, and the instrument of the Court to try the cause; it is his duty, therefore, to try the issues on the record, and I doubt whether he can refuse.]

The application of the defendant is novel. Having taken the chance of a verdict in his favour, and never having asked the judge at the trial to nonsuit the plaintiff, he now, after the plaintiff has obtained a verdict, moves for a new trial. There is no authority for such a proceeding. The rule of law that the civil remedy is suspended until there has been a criminal prosecution, is not of universal application. If the felon died, as in *Stone v. Marsh* (3), the rule does not apply. There is no case which shews that the

(1) 2 H. & C. 146; 32 L. J. (Ex.) 285.

(2) 13 M. & W. 603.

(3) 6 B. & C. 551.

1872
WELLS
v.
ABRAHAM'S.

defendant has a right to have the plaintiff nonsuited, and assuming there was such a right, it rests with the judge, as the guardian of the public interest, whether he will exercise it or not at the time, but under no circumstances can the defendant, after verdict, ask the Court for a new trial.

Torr, Q.C., in support of rule. If at the trial of a cause the evidence tends to shew that a felony has been committed, the action is suspended until the felon has been tried. *Bosanquet, Serjt.*, in *Stone v. Marsh* (1), in his argument, says: "The judgment of the Court in *Dawkes v. Coveleigh* (2), Lord Hale's Treatise on the Pleas of the Crown, p. 546, and a dictum of Buller, J., in *Master v. Miller* (3), all shew that the rule against maintaining a civil action for an act which amounts to a felony is founded upon principles of public policy . . . and all these authorities were considered and confirmed in *Crosby v. Leng*." (4) And it is laid down so in *Com. Dig. Action upon the Case* (B. 5). So an action upon the case lies not for a wrong, which is a felony. And in a note it is stated "where an act amounts to a felony the offender must first be prosecuted before the party injured can sue for redress;" and in the notes to *Ashby v. White* (5), this rule is recognized: it is there said, "and though the damage and wrong be excessive and peculiarly concern an individual, still if it amount to a felony, the private remedy is suspended until public justice shall have been satisfied; a very wholesome rule, and tending to prevent the composition of felonies under the pretence of seeking remedy by action . . . and the statute 9 & 10 Vict. c. 93, for compensating the families of persons killed by accidents, whilst it recognizes the general rule, expressly enacts that it shall not apply to actions brought pursuant to its provisions: see *Com. Dig. Action on the Case* (B. 5)." These authorities shew that the rule exists; if it exists, it must be enforced in favour of the public, and it is the province of the judge at nisi prius to give it effect. *Wellock v. Constantine* (6) is directly in point. The circumstances disclosed in that case amounted to a felony, Willes, J., stopped the case and nonsuited the plaintiff, and a rule for a new trial was dis-

(1) 6 B. & C. at p. 558.

(2) Sty. 346.

(3) 4 T. R. at p. 332.

(4) 12 East, 409.

(5) 1 Sm. L. C. 255, 267, 6th ed.

(6) 2 H. & C. 146; 32 L. J. (Ex.) 285.

charged, the majority of the Court being of opinion "that after it appeared that the civil wrong complained of, and for which a civil remedy was sought by the action, involved a charge of felony, the proper course was not to proceed with the trial, but to prosecute for the criminal offence." *Gimson v. Woodfull* (1) is also in point; that case was commented on in *White v. Spettigue* (2), and there no doubt it was held that the rule does not apply where the action is against a third person innocent of the felony.

[LUSH, J. In *Lutterell v. Reynell* (3) it was expressly decided that a defendant could not by way of plea set up his own turpitude, and say that he had been guilty of a felony in answer to an action for trespass.

QUAIN, J., referred to *Harris v. Shaw*. (4)]

COCKBURN, C.J. I am of opinion that this rule should be discharged. No doubt it has been long established as the law of England, that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted. But although that is the rule, it becomes a different question when we have to consider how it is to be enforced. It may be that the person, against whom a prosecution for felony is pending, may have a right in an action to shew by plea that he is in the position of a felon, and so he may be able to stop the action brought by the person injured by his felonious act, although I think this is open to doubt, because the effect would be to allow a party to set up his own criminality. But it may very well be that, if an action were brought against a person, who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of this Court might be invoked to stay the proceedings which would involve an undue use, probably an abuse, of the process of this Court, in which case the Court is always willing to interfere to prevent such abuse. It may be—I do not say it is so—that if a person, neglecting his duty to prosecute for an offence committed against him, were to bring an

1872

WELLS
v.
ABRAHAM.

(1) 2 C. & P. 41.

(2) 13 M. & W. 603.

(3) 1 Mod. 282.

(4) Cas. t. Hardw. 349.

1872

WELLS

v.

ABRAHAM.

action instead of prosecuting, the Court might be called upon to intervene, and to prevent the plaintiff obtaining by judgment and execution the fruits of the action thus improperly brought; but it is unnecessary now to consider in what way this rule of law might be enforced. The only question for our consideration is, whether it was the duty of my learned Brother who tried this case at nisi prius to interpose; and either to nonsuit the plaintiff, or if the plaintiff refused to be nonsuited, to direct the jury to return a verdict for the defendant.

I am at a loss to see from what source any power either to nonsuit or to direct a verdict could be derived. A judge sitting at nisi prius is not the Court out of which the record proceeds, nor does he represent that Court; he is only the instrument of the Court to try the issues raised. He might refuse to try the case on proper application being made to him, and he might leave it to the Court from which the record proceeded to deal afterwards with the case as they think proper; but when once the case is brought before the judge he can only try the issues raised upon the record. Here there were two issues, the one denying the property in the plaintiff, the other denying the conversion by the defendant. The property was proved to be the property of the plaintiff beyond all question, and there was also evidence that the defendant had converted the article to his own use. If he had done so *animo furandi* that conversion would be a felony and make him liable to prosecution; but the question whether the wrongful act did or did not by the addition of the *animus furandi* become a felony was a question of fact. How was the judge to nonsuit, and how was he to leave the question to the jury? The only questions he could leave to the jury were those arising upon the issues raised, and there was in this case no issue raising the question whether a felony had been committed. I think it clear, when we consider what are the powers of a judge at nisi prius, that my Brother Lush had no jurisdiction to entertain the question of felony. The present application is to grant a new trial on the ground that the learned judge should have directed a nonsuit or a verdict for the defendant. I asked the defendant's counsel whether he would at the trial have assented to the proposition that the facts proved amounted to a felony, and he answered he would not have admitted that they did. Having

obtained a rule founded upon the hypothesis that the facts proved at the trial amounted to a felony, he yet persists in denying that his client has committed a felony, so that he seeks to have the benefit of something the existence of which he denies. When the case has thus been explained it is manifest that the defendant has no locus standi to make this application. He can only apply to us upon the ground that he has committed a felony, but at the same time he denies that he is a criminal. Can it be said that my learned Brother at the trial did anything beyond that which he was called upon to do, namely, try the issues brought before him? I think, therefore, there is no ground for making the rule absolute.

BLACKBURN, J. I also am of opinion that this rule should be discharged. No doubt that there are many dicta of high authority to the effect that when there has been a private injury to a civil right, which may also be the subject of criminal prosecution for felony, it is the duty of the person injured to prosecute for the criminal offence, before he can pursue his remedy by action for the private injury. But although there are many dicta to that effect, I cannot find any case where that rule of law has been acted on before the cases of *White v. Spettigue* (1), and *Gimson v. Woodfull*. (2) While the law throws the prosecution of criminal offences on private individuals, it may be, in some cases, that the civil remedy is suspended until there has been a prosecution for the felony. I am not prepared to say that, if an action were brought against a defendant, and it was stated by the Attorney General on behalf of the Crown that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the Court might not, in such a case, in the exercise of its summary jurisdiction, stay proceedings in the action until the indictment for felony had been tried; or if an action were brought contemporaneously with an indictment for felony, and was an attempt to extort money, then again it might be that the Court would stay proceedings. I am not aware that such cases have arisen, and I am not to be understood to say a proper case might not arise in which the Court might interfere. But what is now urged is that it was my Brother Lush's duty, when trying this

1872

WELLS
v.
ABRAHAM.

(1) 13 M. & W. 603

(2) 2 C. & P. 41.

1872

WELLS
v
ABRAHAM.

cause in which there were two issues, one of not guilty and the other not possessed, to nonsuit the plaintiff, and, I suppose, if the plaintiff refused to be nonsuited, to enter the verdict for the defendant. In effect the argument comes to this, the jury are to be told that, although the defendant is guilty of the conversion, and the plaintiff is possessed of the goods, yet, if they are of opinion that the defendant had animus furandi at the time of conversion, they are, contrary to the fact, to find that the defendant is not guilty and that the plaintiff is not possessed. I think that the defendant could not plead that he had been guilty of a conversion, and that the conversion amounted to a felony, and was done under such circumstances that there was ground for charging him with the felony, and that, therefore, the action ought to be suspended until the felony was tried. It would be a strange plea, and no such plea was ever pleaded, and I think it is not a matter of plea at all.

All the dicta in the books can be traced back to *Markham v. Cobb*. (1) That was an action of trespass, and the defendant pleaded, in effect, that the plaintiff had indicted and convicted him before the justices of gaol delivery of having burglariously broken the said house and feloniously taken therein 3000*l.*, which was the said trespass. He endeavoured to raise the question that the plaintiff having elected to proceed by the criminal law was debarred from bringing a civil action. The Court held that there was some technical defect in the plea, and that it was bad. But two of the judges, Dodridge and Whitlock, JJ., were of opinion that, although the defendant had been convicted of feloniously taking the goods, nevertheless the owner could have an action of trespass and recover damages; that if a man took the goods of J.S. he could sue him civilly in an action of trespass, or by way of an appeal of felony, criminally, but if he brought an appeal of felony and was nonsuited, he could not afterwards bring an action of trespass. But Jones, J., was of a different opinion, and said that a man who had been convicted could not be subject to an action of trespass for the same thing; and he seems to have been of opinion that if the goods were taken animo furandi the only proper remedy of the owner was by appeal of felony or by

(1) Sir W. Jones, 147.

indictment; though he admits that if he brought an action of trespass, the defendant could not plead that he had stolen them or taken them *animo furandi*, for he cannot aver his own intention.

There was also the case of *Higgins v. Butcher*. (1) The declaration alleged that the defendant assaulted and beat the plaintiff's wife so that the next day she died. It was held that the action would not lie, and no doubt that is quite right; but it was said by Tanfield, J., "If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because, the servant dying of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before; his action is thereby lost." This dictum of Tanfield, J., is the first authority I can find for the notion that the civil remedy was merged in the felony. It is added to the report that Fenner and Yelverton, JJ., assented to that. *Dawkes v. Coveleigh* (2) arose on a special verdict; it was found that the defendant did feloniously break into the plaintiff's house and carry away 250*l.*, and was indicted for it, and was found guilty and was burnt in the hand. The question was whether, after that, an action of trespass *quare clausum fregit* and for carrying away the money was maintainable by the plaintiff. It was objected that the trespass was brought for the same fact for which the defendant had been tried, and therefore it was unreasonable that he should be doubly punished for it. Roll, C.J., said that in *Markham v. Cobb* (3) Dodridge and Whitlock, JJ., held that trespass lies, but Jones, J., held the contrary, because if the party robbed might have his election either to indict the felon or to bring his action of trespass, many felonies would be smothered and this would prove very dangerous. And the report goes on, "In *Higgins' case*" [that is, *Higgins v. Butcher* (1)], "it was adjudged, where an action of trespass was brought by the husband for beating his wife by reason whereof she died, that the action did not lie, because it was felony." That is a mistake, that is not the reason why the action did not lie. Jerman, J., differed from Roll, C.J., and said, with great truth and reason, "that

1872

WELLS
v.
ABRAHAM.

(1) Yelv. 89.

(2) Sty. 346.

(3) Sir W. Jones, 147.

1872
WELLS
v.
ABRAHAM.

the inconvenience on the other side would be greater, if the felon shall so take advantage of his own wrong." Then there was a second argument; and judgment was given for the plaintiff, on the ground that the action had been brought after a conviction, and there was no fear that the felon should not be tried. It is true that Roll, C.J., says, "but if it were before conviction the action would not lie, for the danger the felon might not be tried;" but that was not necessary for the decision of the case.

I do not see how a plaintiff can be prevented from trying his action, unless the Court, acting under its summary jurisdiction, interfere, and I know of no instance in which, in a case like the present, it has interfered; but I apprehend it might do so. From the time these cases were decided, there is no reported instance of the Court having interfered to stop an action, until we come to *Gimson v. Woodfull*. (1) That case went to this extent, that where a horse had been stolen by A., and B. afterwards had the horse, the owner could not bring an action to recover it from B. unless he had prosecuted A. But in *White v. Spettigue* (2) that was expressly overruled. The last case is *Wellock v. Constantine*. (3) The circumstances of that case are different from the present. The plaintiff's case on the face of the declaration was that the defendant had committed felony. The evidence in effect was that the defendant had connection with the plaintiff forcibly and against her consent. It was essential for the plaintiff to shew that the connection was without her consent, for if it was with her consent she had no cause of action. If the Court had summary jurisdiction to order that the wrong, the subject of the civil action, should not be tried until the criminal charge had been determined, the Court might possibly have exercised its summary jurisdiction in staying the action; but no such course was taken; and Willes, J., ruled that the action would not lie, and stated that he would direct a verdict for the defendant, upon which the plaintiff consented to a nonsuit, and the Court of Exchequer did not set aside the nonsuit. Every dictum of every judge that is reported in the case shews that they thought the judge did wrong to nonsuit the plaintiff. That case, I think, cannot be treated as an authority. The Court suggested that

(1) 2 C. & P. 41.

(2) 13 M. & W. 603.

(3) 2 H. & C. 146; 32 L. J. (C.P.) 285.

a *stet processus* should be entered, but to this the parties did not agree. Pollock, C.B., and Bramwell, B., then agreed that the rule ought to be discharged, Martin, B., dissenting, and Channell, B., expressing no opinion. No reasons are given in the report for this judgment. I think that the Court ought to have held that the nonsuit was wrong; but that, if they set it aside, it might have been on the terms that the proceedings should be stayed until the criminal charge had been tried. But to say, that, because it was for the interest of the public the action should be stayed until the indictment was tried, and for this purpose to nonsuit the plaintiff, or to direct the jury to find a verdict for the defendant upon issues not proved, seems to me to be erroneous.

I am therefore clearly of opinion, first, that the defendant could not by plea raise the question that the action ought to be suspended; and, secondly, if he could, he has not done so, and the rule ought to be discharged.

LUSH, J. I am of the same opinion. It is undoubtedly laid down in the text-books, that it is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement; but by what means that duty is to be enforced, we are nowhere informed. I am unable to find a single instance in which there has been directly any attempt to enforce that duty. It has been decided in *Lutterell v. Reynell* (1) that it does not lie in the mouth of the party to say that he himself was a thief; he cannot be allowed to set up his own crime as a bar to the redress of the person who sues him in an action. When we consider the functions of a judge at *nisi prius*, it seems to me perfectly clear it is not competent to him to interpose in the middle of the case to enforce that duty. He cannot refuse to try the cause. In the first place, I do not see how he can stay proceedings, when part of the evidence is given, against the will of the parties, and certainly he cannot nonsuit if the evidence before him is such as ought to be submitted to the jury. His duty is simply to try the cause on the issues that are joined. It seems to me he has no power to stay proceedings and direct a nonsuit or a verdict con-

1872

WELLS

B.
ABRAHAM.

(1) 1 Mod. 282.

1872
WELLS
v.
ABRAHAM'S.

trary to the evidence. If the declaration discloses that which would be the subject of a demurrer or a motion in arrest of judgment, I cannot see that the judge dealing with the cause at nisi prius has any power to interfere in order to enforce that supposed defect.

QUAIN, J. I also think this rule should be discharged. I have not been able to understand during the argument the exact position in which Mr. Torr places himself. He asks us to set aside the verdict, and I suppose to grant a new trial for misdirection, which is the only way it could be properly put, on the ground that his client has been charged with felony on the very same facts as were proved at the trial, and when he does that he at the same time produces an affidavit in which his client denies the felony. Mr. Torr first takes his chance of a verdict for the defendant in the civil action without saying a syllable about the felony at the trial, for the very obvious reason that it would have jeopardised his chance of a verdict if he had done so. Then having taken his chance in the civil action, he comes here to set aside the verdict, and asks for a new trial, on the ground that a felony has been committed, and a civil action cannot be maintained until the felon has been prosecuted. That is an utterly inconsistent position.

Now it is clear if he had taken that position at the trial he would have jeopardised any defence that he had, for he would have asked the judge to decide for himself that the evidence proved a felony, and that the action ought to be stopped. How can the judge at nisi prius take such a duty upon himself? Nor has Mr. Torr brought forward a single case in which an application of this kind has ever been made before, or such a defence ever pleaded by the felon himself. We have a great many cases in which it arises inferentially against third parties where a felony was committed by others. I am at a loss to find any case where an application of this kind or a plea containing a similar matter has been ever set up by the defendant himself. That being the case, it appears to me we cannot make a precedent. If, on the other hand, it appeared on the face of the declaration, as it did in the case in the Exchequer, where the felony was laid as the ground of the action in the declaration, that might be a case for

demurrer, or for a motion in arrest of judgment. It appears to me, therefore, no authority being cited to the contrary, that the course the learned judge pursued at the trial was quite right, and that this rule ought to be discharged.

1872
WELLS
v.
ABRAHAMS.

Rule discharged. (1)

Attorneys for plaintiff: *Wright & Venn.*

Attorneys for defendant: *Chinery & Aldridge.*

(1) See *Quinlan v. Barber*, Batty's Ir. Rep. 47; *Hayhes v. Smith*, Smith & Batty's Ir. Rep. 378.

END OF EASTER TERM, 1872.

CASES
 DETERMINED BY THE
 COURT OF QUEEN'S BENCH,
 AND BY THE
 COURT OF EXCHEQUER CHAMBER
 ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,
 IN AND AFTER
 TRINITY TERM, XXXV VICTORIA.

1872
 May 22.

FRASER AND OTHERS *v.* THE TELEGRAPH CONSTRUCTION AND
 MAINTENANCE COMPANY.

*Bill of Lading, Construction of Contract under—Description of Vessel as
 “Steamship.”*

1 P.D. 455-8

Goods were shipped by plaintiffs on board defendants' vessel, under a bill of lading, “shipped on board the steamship *Hibernia* . . . from Singapore to London . . . with liberty to call at any ports, in or out of the route, to receive and discharge coals . . . &c., and to tranship the goods by any other steamer”—

Held, that the contract of the defendants was that the goods should be carried on board a ship in which the principal motive power during the voyage should be steam.

FIRST COUNT, that, in consideration that plaintiffs would at defendants' request cause to be shipped on board a certain steamship of the defendants, called the *Hibernia*, which was then possessed of such motive and propelling powers as steamships of the class of the *Hibernia* ordinarily are possessed of, certain goods, to wit, black pepper and coffee, for reward to defendants, defendants promised that they would carry the said goods in the said steamship from Singapore to London, and would during the voyage

use and employ the motive and propelling powers belonging to the said steamship; that plaintiffs accordingly shipped the goods; breach, that defendants did not use and employ the motive and propelling powers of the steamship in the manner in which such powers are employed by steamships in the usual course of navigation, whereby the goods were delayed on the voyage and plaintiffs lost their market.

Second count, that plaintiffs delivered to be carried in the *Hibernia* the goods as in the first count mentioned, and it became the duty of defendants to use the motive powers as in the first count mentioned; breach, that they did not.

Third count, that, in consideration that plaintiffs would ship goods on board the steamship *Hibernia*, to be carried, &c., as in the first count defendants promised that they would carry within a reasonable time, which they did not do.

Fourth count, alleging that it was the defendants' duty to carry the goods within a reasonable time.

Fifth count, that the goods were delivered to defendants, as carriers of goods, to be carried within a reasonable time; breach, that they did not so carry.

The material pleas were a traverse of the promises and duty respectively as alleged, and of the breaches, on which issue was joined.

At the trial before Mellor, J., at the sittings in London after Michaelmas Term, 1871, it appeared that the plaintiffs are merchants at Singapore, and they in November, 1870, shipped some pepper and coffee on board the defendants' vessel the *Hibernia*, under bills of lading in the following form: "Shipped in good order and condition in the steamship *Hibernia* . . . lying off the port of Singapore, and bound for London, having liberty to call at any port or ports in or out of the customary route in any order to receive and discharge coals, cargo, and passengers, and for any other purpose . . . to tow and assist vessels . . . and to tranship the goods by any other steamer, 1796 bags black pepper, to be delivered in like good order and condition at the port of London, inter alia, damage from machinery, boilers, or steam, however caused, or from explosions, heat, or fire on board . . . default of engineer excepted, at 2*l.* per ton of 16 cwt."

The *Hibernia* was what is called an auxiliary screw steamer, and

1872

FRASER
v.
TELEGRAPH
CONSTRUCTION
COMPANY.

1872
FRASER
v.
TELEGRAPH
CONSTRUCTION
COMPANY.

not a full power steamer. The captain admitted that, acting on the defendants' instructions, he had made a sailing voyage home, having originally only 500 tons of coals on board, and 50 tons remaining at the end of the voyage; but on the voyage he met with an unusual amount of calm weather. The voyage took 135 days, being longer than an ordinary voyage of a sailing vessel, and from sixty to seventy days being the average voyage of a steamer round the Cape.

The plaintiffs relied on the third and fourth counts.

The learned judge left it to the jury to say whether, having regard to the nature of the vessel and the weather, the voyage had been made in a reasonable time or not.

The jury found for the defendants.

A rule was obtained for a new trial, on the ground that the judge had misdirected the jury in not telling them that the contract was for carriage in an ordinary steamship; and that the verdict was against the evidence.

Pollock, Q.C., and *Cohen* shewed cause, and contended that there was no warranty in the bill of lading that the *Hibernia* was an ordinary steamship, which was what the contention for the plaintiffs amounted to. "Shipped in the steamship *Hibernia*" was no part of the contract, it was merely the description of the vessel on board of which the goods were received.

Sir J. B. Karlake, Q.C., and *A. L. Smith* were not heard in support of the rule.

COCKBURN, C.J. I think this rule should be made absolute. The miscarriage, I think, has arisen from the virtual abandonment of the first two counts, though, undoubtedly, when we come to look at the declaration more closely, the same questions are involved in the third count, which alleges a non-performance of the contract on the part of the shipowners in not navigating with reasonable expedition. The first question which we have now to dispose of is, whether on the terms of this contract it was necessary that the ship should be a steamship. She is expressly so called in the bill of lading. The bill of lading also contains a provision, which is not unimportant, that the vessel shall be at liberty to call at

any port or ports in or out of the accustomed route in order to receive or discharge coals. She is also at liberty to tranship goods into any other steamer. The effect of the whole of that is, I think, to make it incumbent on the shipowners that the vessel, by which these goods are to be shipped, and for the shipping of which goods on board the vessel the bill of lading is given, shall be a vessel propelled by steam. I am very far from saying that where it is convenient, as it often is, for a steam vessel to use sailing power instead of steam power when the wind happens to be favourable, it is necessary that the vessel should be at all times and under all circumstances propelled by steam; but the meaning of a vessel being a steamship is, that the principal motive power used shall be the power of steam, and not sails. I think that is the true meaning of this contract, and, therefore, that it should have been left to the jury to say whether the vessel had satisfied those conditions. But I must still adhere to what I said in the course of the argument, that, even supposing the true construction of the contract should be, that an auxiliary screw steamer would have satisfied the terms of the bill of lading, it appears to me that that involves that the auxiliary screw power should be used so far as it is reasonably possible. It might happen that a vessel might be driven out to sea far from a coaling port, and unable to get coal; but so far as it is practicably possible, there is an engagement that the auxiliary steam power shall be forthcoming; and it is not enough for the captain to say, "I will use my discretion in carrying out the instructions of my employer, and I will make this a sailing voyage, and therefore it is not necessary, when my coal is exhausted by adverse winds, to put into any port for coal." If the case goes down to a new trial, and it should be thought expedient to enter into the second question, I must say that I think the evidence had much better be made more complete than it was at the first trial. But it is now enough to say that, according to the construction I put on this contract, it means that this vessel, the *Hibernia*, on which these goods were shipped, shall be a vessel being primarily and principally propelled by steam power, and not by mere sailing power. That appears not to have been the way in which the case was left to the jury, and therefore I think there should be a new trial.

1872

FRASER
v.
TELEGRAPH
CONSTRUCTION
COMPANY.

1872

FRASER

v.

TELEGRAPH
CONSTRUCTION
COMPANY.

BLACKBURN, J. I also think there should be a new trial. The first two counts at the trial were abandoned, the plaintiffs relying on the others, which stated in substance that the goods were to be delivered in a reasonable time, and that the defendants did not deliver them within a reasonable time, those counts also stating, I may observe, that the goods were put on board the "steamship" *Hibernia*. Now I apprehend that upon those counts what the plaintiffs were entitled to prove was that the reason why these goods were delayed was that the defendants, the shipowners, did not use reasonable exertions. If the voyage had been delayed by a storm, or by anything that may happen on a voyage without the fault of anybody, I take it that would not have proved that the defendants did not use reasonable exertions, because the delay would have been caused by something over which they had no control. What is meant is, that the defendants must make reasonable exertions under the circumstances to carry the goods on board the vessel on which they were shipped. Then it makes the greatest difference possible what was the sort of ship in which the goods were to be carried, according to the contract, and within what time it was that the contract ought to be completed, because the exertions are to be reasonable exertions, and they would vary very much with the nature of the ship. If the contract had been, "We will carry your goods on board this ship, which is a sailing ship, having an auxiliary screw, and using it at intervals when it is convenient so to do," then their duty would have been one thing; but, on the other hand, if they say, "We will carry these goods by steamship, working as a steamship, although we may, when the wind is favourable, choose to run her as a sailing vessel, and a sailing vessel only," that would involve a different kind of exertion: because in one case they would use a great deal more steam than in the other. The view that my Brother Mellor seems to have taken at the trial, and he was led to it by the course the evidence took, was to treat this as if it was clearly a contract to carry the goods by a ship using an auxiliary screw, and an auxiliary screw only. In that view of the matter I think his direction, so far as I understand it, was the right one, namely, that the jury were to say whether the defendants used reasonable exertions, and used coal at the reasonable and usual times, at the

times which are customary and proper with an auxiliary screw. But then, unfortunately, as it seems to me, on looking at the bill of lading, the contract was different. The bill of lading, notwithstanding some case that Mr. Cohen referred to in the Common Pleas (1), must be taken to be the contract under which goods are shipped, and until I am told differently by a Court of error, I shall so hold. [The learned judge read the material parts of the bill of lading.] I can in no way construe that as meaning more or less than this, that the goods are to be shipped on board the "steamship" *Hibernia*, which is a steamer to be worked as a steamer, with liberty to tranship to any other steamer, not on to a sailing vessel, but on board another steamer. I can only construe that as meaning that it is part of the contract that the goods are to be forwarded per steamer, that is, by a vessel worked by steam motive power principally. It is not necessary that it should be worked every day by steam power, but worked by steam power as the chief and principal power. If that is taken to be the right view of the contract, and that was to be the kind of ship that the goods were to go by, then the evidence is all on the plaintiffs' side. The defendants avowedly tried to make a sailing voyage, merely using the screw as an auxiliary, that is to say, now and then, but making it a sailing voyage, and consequently the vessel took 135 days, while a steam voyage might have been accomplished in about sixty-five days. Taking that view of the contract, I have no doubt that the plaintiffs are right, and the defendants are wrong; but taking the view my Brother Mellor took of it, and the way he left it to the jury, I am not prepared to say whether the jury were right or wrong. This is a case in which it is required that the evidence should be looked at carefully, and I dare say the jury were competent judges of the matter; but, at all events, I think there ought to be a new trial, and then, if the parties question this ruling upon the construction of the contract, they can carry the case to a court of error. In my opinion the proper direction was not left to the jury, inasmuch as they should have been told that the plaintiffs

1872

FRASER

v.

TELEGRAPH
CONSTRUCTION
COMPANY.

(1) *Cohen* had referred in argument to an anonymous unreported case in the Common Pleas, in which he was understood to say it had been decided that

evidence was admissible of a parol contract that goods should not be placed on deck, although the bill of lading was in the ordinary form.

1872

FRASER
v.
TELEGRAPH
CONSTRUCTION
COMPANY.

were entitled to have reasonable exertions made and that the goods should have been carried by a vessel which was principally a steamer, which seems not to have been the case, and therefore I think there ought to be a new trial.

LUSH, J. I am of the same opinion. I think the proper construction was not put upon the bill of lading at the trial. It was not the contract that the vessel's steam power should be used merely to supplement her sailing power when the wind failed, and when there was no other motive power; but it was to be used as the primary motive power, so as to keep her going at the same rate of speed as if she had been purely a steam vessel.

MELLOR, J. I am of the same opinion. I did not at the trial put the construction upon the contract that has been put upon it by the Court, and which, upon consideration, I entirely agree with. The way in which it was put at the trial has been correctly described by my Brother Blackburn; and although I was very much struck by the concluding passage in Mr. Smith's reply, as to this vessel being out 134 or 135 days, I should not have been prepared to say judicially that I was dissatisfied with the verdict, provided my view of what was the proper question to be left to the jury turned out to be the right one. It is not necessary to give an opinion upon that now; but I may say that my impression was, that I should have found a verdict the other way myself, but I could not have said that I was judicially dissatisfied with it.

Rule absolute.

Attorneys for plaintiffs: *Shaw & Crossman.*

Attorneys for defendants: *Bircham & Co.*

CHERRY v. THOMPSON.

1872

May 28.

Practice—Summons under s. 18 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76)—British subject residing without the Jurisdiction—Cause of Action.

The plaintiff and the defendant, both British subjects, being in Germany became engaged to marry. The plaintiff came to England, and there received a letter written and posted by the defendant in Germany, in which she declined to carry out her engagement. The plaintiff sued out a writ of summons under s. 18 of the Common Law Procedure Act, 1852:—

Held, that the words “cause of action,” in the above section, mean the whole cause of action, and do not apply where a contract has been made out of the jurisdiction and the breach has occurred in England.

Sichel v. Borch (2 H. & C. 954),¹ and *Allhusen v. Malgarejo* (Law Rep. 3 Q. B. 340), adhered to; *Jackson v. Spittall* (Law Rep. 5 C. P. 542) dissented from.

Held, also, that the breach of the contract to marry occurred in Germany, the receipt of the letter only furnishing evidence of the breach and not constituting the breach itself.

MOTION to set aside a master's order allowing the plaintiff to proceed under s. 18 of Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). (1)

The facts fully appear in the judgment.

A rule having been granted,

April 16. *Day, Q.C.*, shewed cause in the first instance. He contended, first, that “cause of action” in s. 18 did not mean “whole cause of action,” but the act on the part of the defendant which gives the plaintiff his cause of complaint: *Jackson v. Spittall*. (2)

(1) 15 & 16 Vict. c. 76, s. 18: “In case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts. . . . it shall be lawful for the plaintiff to issue a writ of summons. . . . and it shall be lawful for the Court or judge, upon being satisfied by affidavit that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or

that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts, in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such Court or judge may seem fit. . . .”

(2) Law Rep. 5 C. P. 542.

(a) 1872 10 June 28 107. 287 / 1077

1872
CHERRY
v.
THOMPSON.

Secondly, that the breach of the contract occurred in England, where the letter was received: *Rex v. Burdett* (1); *Newcomb v. De Roos*. (2)

J. J. Aston, in support of the rule, relied on *Allhusen v. Malgarejo*. (3)

Cur. adv. vult.

May 28. The judgment of the Court (Cockburn, C.J., Blackburn, Lush, and Quain, JJ.) was delivered by

BLACKBURN, J. This is a rule to set aside the order of the master allowing the plaintiff to proceed against the defendant, a British subject residing out of the jurisdiction, who has been served abroad with a writ issued under the Common Law Procedure Act, 1852, s. 18.

On appeal to Willes, J., he referred the question to the Court.

The facts are not in dispute. It appears that the plaintiff and defendant, who are both British subjects, being in Germany, there became engaged to marry each other. It was intended that the marriage should take place in Germany, but no precise time was fixed for the performance of the contract. It was therefore in contemplation of law a contract to marry in a reasonable time.

The plaintiff came for some temporary purpose to England, and there received a letter, written and posted by the defendant in Germany, in which she informed him that, owing to the opposition of her father, she must consider the engagement at an end. There can be no doubt, since the decision in *Frost v. Knight* (4), that the plaintiff was at liberty to treat this as a breach of the promise to marry, though the reasonable time had not elapsed; for it was a renunciation of the contract, putting an end to the relation which they had contracted of betrothed persons. There was, therefore, unquestionably a cause of action between the parties; whether there is, or is not, any justification or excuse on the part of the defendant, is a question which must be raised by plea after appearance. But the question now is, whether there was, within the meaning of the 18th section of the Common Law Procedure Act,

(1) 4 B. & A. 95.

(2) 2 E. & E. 271; 29 L. J. (Q.B.) 4.

(3) Law Rep. 3 Q. B. 340.

(4) Law Rep. 7 Ex. 111.

By Mr. H. S. 68

1852, "a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction." There is unfortunately a difference of opinion as to the construction of those words.

1872

CHERRY
v.
THOMPSON.

In *Sichel v. Borch* (1) the Court of Exchequer, consisting of Pollock, C.B., Martin and Pigott, BB., decided (though with some doubt on the part of Pigott, B.) that, under the 19th section of the same Act, a foreigner resident abroad, who by the 19th section is put upon the same footing as a British subject under the 18th, could not be compelled to appear to a writ, unless the *whole* cause of action was shewn to have arisen in this country. This decision was acted upon in *Allhusen v. Margarejo* (2) by this Court, consisting of Blackburn, Mellor, and Lush, JJ., who not only acted on the authority of the Court of Exchequer, but expressed their concurrence in the reasons given for the decision. But in *Jackson v. Spittall* (3) the Court of Common Pleas, consisting of Bovill, C.J., Keating, Montague Smith, and Brett, JJ., decided that the words "cause of action" meant, not the whole cause of action, but, as they express it, "the act on the part of the defendant which gives the plaintiff his cause of complaint." That case, like the present, arose under the 18th section, the defendant there being a British subject; but it is not disputed that if a defendant being a British subject can be compelled to appear under the 18th section, a defendant, being a foreigner, may under similar circumstances be compelled to appear under the 19th section.

In general the decision of a Court of competent jurisdiction is considered binding on a Court of co-ordinate jurisdiction, the party who is dissatisfied with the decision being left to question it in a Court of error. But where (as in the present case) there is no mode of raising the question in a Court of error, the decision of another Court is not binding: it ought to be treated with respect as an authority; but if, after considering it carefully and respectfully, the Court in which the matter is pending comes to the conclusion that the other Court was wrong, they are justified in acting on their own opinion. The Court of Common Pleas were therefore justified in acting on their own opinion, though in direct

(1) 2 H. & C. 954; 33 L. J. (Ex.) 179. *10 Jan 1857*

(2) Law Rep. 3 Q. B. 340.

(3) Law Rep. 5 C. P. 542.

1872

CHERRY
v.
THOMPSON.

conflict with the two decisions of the Courts of Queen's Bench and Exchequer, if, after consideration, they were satisfied that they were right and those two Courts wrong. But we, in like manner, are entitled in our turn to exercise our independent judgment on the question; and if, after giving to the reasoning of the Court of Common Pleas the attentive consideration which is due to it, we arrive at a different conclusion, we must act on our own opinion.

Since the decision of *Jackson v. Spittall* (1) a case of *Durham v. Spence* (2) has occurred in the Exchequer, in which Pigott and Cleasby, BB., expressed their assent to the judgment of the Common Pleas, whilst Kelly, C.B., and Martin, B., adhered to the decisions in *Sichel v. Borch* (3) and *Allhusen v. Malgarejo* (4), though Martin, B., was of opinion (in which we should have concurred) that, under the circumstances of the case, the whole cause of action accrued in England. As far, therefore, as the weight of authority goes it may be considered nearly equal.

Under these circumstances we have given the case our best consideration.

After carefully considering the judgment of the Court of Common Pleas in *Jackson v. Spittall* (1) we are unable to concur in that decision. We entirely adhere to what was said by Blackburn, J., in *Allhusen v. Malgarejo* (4), and by the Court of Exchequer in *Sichel v. Borch*. (3) The Court of Common Pleas are, no doubt, right in saying that, according to the decisions, the Courts of this country have jurisdiction to try all transitory actions, wheresoever arising, if the defendant voluntarily appears in our courts, or comes within the jurisdiction, so as to be served with process within it. If a cause of action arose entirely abroad, between two foreigners resident in their own country, and then the defendant came to England, the plaintiff might follow him and sue him here; and before the Common Law Procedure Act, if a foreigner had property here, he might perhaps, by the process of distringas, and increasing the issues, have been compelled to consent to appear; and a British subject resident abroad might have been indirectly compelled to appear by outlawry. But the legis-

(1) Law Rep. 5 C. P. 542.

(2) Law Rep. 6 Ex. 46.

(3) 2 H. & C. 954; 33 L. J. (Ex.)

179. *10 H. & C. 515*

(4) Law Rep. 3 Q. B. 340.

1872

CHERRY
v.
THOMPSON.

lature in the Common Law Procedure Act, 1852, do not say that a writ of summons may be served and proceeded upon whenever the cause of action is one which might be sued upon in this country. And there was good reason why they should not say so; for they were giving powers to proceed not only against English subjects, whom our legislature may bind as it pleases, but also against foreigners not resident in this country; and we cannot doubt that if our legislature had enacted that a foreigner resident in his own country should be liable to be served with our process, so as in case of his non-appearance to enable a plaintiff to proceed to judgment, for a cause of action arising in the country of the foreigner, the latter would be entitled to treat this as an usurpation, and his government would have good ground for complaining of it. Nor has the legislature made the right to compel an appearance to depend at all on the possession of property within the jurisdiction. The legislature has carefully confined the power of compelling the appearance of the foreigner not resident in this country to two cases. The one is where the cause of action arises in this country; and if this means the whole cause of action, the foreigner who is compelled to appear in our courts to answer a cause of action arising entirely in our own country has no just cause of complaint; but if he were compelled to appear when only a part of the cause of action arises here, we think he would have good cause to complain. The other case is where the foreigner has, either in person or by his agent, made a contract in this country, in which case there is at least a plausible ground for saying that the foreigner who has made a contract in this country cannot complain if he is called upon to answer in the courts of this country for the breach of a contract made within it.

We cannot concur with what appears to us to be the reasoning of the Court of Common Pleas in *Jackson v. Spittall* (1), founded on the collocation of the words in s. 18. To us, on the contrary, it appears that the collocation of the words leads to a directly opposite construction. It appears to us that the legislature in s. 18 of the Common Law Procedure Act has acted on the principles hereinbefore referred to, and has intended carefully to distinguish between actions *ex delicto* and actions *ex contractu*;

(1) Law Rep 5 C. P. 542.

1872

CHERRY
v.
THOMPSON.

and to enable the British subject resident abroad, or a foreigner out of the jurisdiction, to be served with process and sued in our courts—in an action of tort, where the whole cause of action arises in this country—in an action of contract, where the contract has been made within it, without regard to where the breach may occur, but still only when the contract has been made in this country. The position taken in the Court of Common Pleas confounds the two kinds of actions thus intended to be kept distinct; and though the right of the plaintiff arises out of contract, and the contract has been made out of the jurisdiction, and therefore the case would not come within the second branch of the enactment, yet, because the breach takes place in this country, treats the case as coming within the first branch, on the ground that the cause of action arose here. Now, it is obvious that if this can be done the provision of s. 18 relating to actions on contract, and requiring the contract, for breach of which the action is brought, to be made within the jurisdiction, would be wholly superfluous whenever the breach of contract occurred in this country. To bring such a case within the section, it thus becomes necessary to hold that the term “cause of action” is not the entire cause of action, but only the act of the defendant which immediately gives to the plaintiff his cause of complaint. But this reading appears to us inconsistent with the second branch of the enactment, which requires that the contract shall be made within the jurisdiction, seeing that according to this construction the breach of a contract would be a cause of action under the first branch wheresoever the contract may have been made, while, as we have said, the language of the section in our opinion plainly indicates that a distinction is to be observed between tort and contract, and that in respect of actions arising out of contract, the question is, not whether the cause of action arose within the jurisdiction, but whether the contract was made there. Even if the case came within the first branch of the section, we abide by our former opinion that the cause of action must mean the whole cause of action; as otherwise the breach of a contract not made within the jurisdiction would bring a foreigner within it, which would be contrary to what must be inferred from the terms of the second branch of the enactment to have been intended by the legislature.

We are therefore of opinion, that, even if the letter from the defendant putting an end to the contract received by the plaintiff in this country amounted to a breach here, yet, as the entire cause of action did not arise here, the contract having been made abroad, the service could not be made abroad.

But assuming that the breach of the contract, if occurring here, would enable the plaintiff to serve the defendant with process under the statute, we are of opinion that not only was the contract made abroad, but the breach occurred there also. In the case of *Frost v. Knight* (1) the judgment delivered in the Court of Exchequer Chamber shews with great force the reasons why the renouncing of the relation of betrothed persons by one party is at the option of the other a breach of the promise to marry, though the time for the performance of the contract has not yet arrived. In this case the receipt of the letter by the plaintiff in England furnished him with evidence that the defendant had in Germany renounced that relation. Had his letters followed him to Ireland he would have received the evidence in Ireland. But the act which he had the option to treat as a breach took place in Germany, and in Germany alone.

On this short ground, as well as on the construction of the statute, we think the rule should be absolute to rescind the master's order.

Rule absolute.

Attorney for plaintiff: *F. S. Gosling.*

Attorneys for defendant: *Vandercom, Law, Hardy, & Co.*

(1) Law Rep. 7 Ex. 111.

1872

May 31.

JOYCE v. THE REALM MARINE INSURANCE COMPANY.

Marine Insurance—Construction of Policy—“To commence at and from loading at, as above,” how far qualified by other Terms of Policy—Re-insurance.

Defendants underwrote a policy of insurance for 1000*l.*, declared to be upon cargo, being a re-insurance subject to all clauses and conditions of the original policy, in the ship *Daybreak*, at and from any port or ports in any order on the west coast of Africa to the vessel's port of discharge in the United Kingdom; the insurance “to commence from the loading of the goods at as above.” By the original policy the insurance was for 1000*l.* upon the cargo valued at 3350*l.* of the said vessel *Daybreak*, at and from Liverpool to any ports in any order backwards and forwards on the coast of Africa, and thence back to a port of discharge in the United Kingdom; with leave to increase the valuation of the cargo on the homeward voyage; outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge. Goods, shipped at Liverpool, were lost by perils insured against more than twenty-four hours after the vessel had arrived at her first port of discharge on the coast of Africa:—

Held, that the clause of the policy declared upon, that the insurance was to commence on the loading of the goods at as above, viz., a port on the coast of Africa, must be taken as qualified by the clause in the original policy, that outward cargo was to be considered homeward interest twenty-four hours after the ship's arrival at her first port of discharge; and that the policy had therefore attached.

DECLARATION on a policy of insurance executed by the defendants, by which in consideration of 30*l.* the defendants promise and agree with plaintiff that the company will pay and make good all such losses and damages hereinafter expressed as may happen to the subject-matter of this policy, and may attach to this policy in respect of the sum of 1000*l.* hereby insured, which insurance is hereby declared to be upon cargo, being a re-insurance subject to all clauses and conditions of the original policy, and to pay, as may be paid thereon, general average and salvage charges to be settled as per foreign statement if so made up, in the ship or vessel called the *Daybreak*, lost or not lost, at and from any port or ports, place or places in any order on the west coast of Africa to the vessel's port or ports of call and of discharge in the United Kingdom, and the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above, and continue until the said goods and merchandise be discharged

and safely landed at as above. . . . That it was a clause and condition of the said original policy that the insurance made by the said original policy should be for 1000*l.* upon the cargo valued at 3350*l.* of the said vessel *Daybreak* at and from Liverpool to any port or ports, place or places in any order backwards and forwards and forwards and backwards, on the coast of Africa and African islands, during her stay and trade there, and thence back to a port of call ^{and} discharge in the United Kingdom, with leave to call at or off any ports or places for any purpose, and to discharge, exchange, and take on board goods wherever she might call at or proceed to, and to tranship, sell, or barter all or any goods or property on the coast of Africa and African islands with any vessels, boats, factories, and canoes, and to transfer interest from this vessel to any other vessels, and from any other vessels to this vessel in port and at sea, without being deemed a deviation; with leave to increase the valuation of the cargo on the homeward voyage; outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge. That divers goods, being the goods in the first-named policy mentioned, were shipped at Liverpool, and the said vessel with the said goods on board departed from a port or place on the west coast of Africa, to wit, Cabenda, on and in the course of the said voyage in the original policy described as aforesaid, and afterwards while the said ship was proceeding on her said voyage within the meaning of both the policies, and more than twenty-four hours after she had arrived at her first port of discharge within the meaning of the original policy, and during the continuance of the said risk, the said goods being then on board of the said ship were by the perils insured against by the said original policy wholly lost, and the sum of 1000*l.* became payable and was paid on the said original policy in respect of such loss.

1872
JOYCE
v.
REALM
INSURANCE CO.

Demurrer, on the ground that it appears from the declaration that the goods were not loaded at any port or place on the west coast of Africa.

Joinder in demurrer.

G. Wood Hill, for the defendants. The risk had not attached on this policy, the goods not having been loaded on the coast of

1872

JOYCE
v.
REALM
INSURANCE CO.

Africa. The insurance is from ports on the west coast of Africa to ports in the United Kingdom; "beginning the insurance from the loading at as above," that is, a port on the west coast of Africa, *primâ facie*, must mean that the risk is not to commence till at least some goods are loaded there: *Rickman v. Carstairs* (1); and in the present case no goods had been loaded there. There must at least have been a constructive loading by a removal and reloading of part: *Carr v. Montefiore* (2); see the judgment of Cockburn, C.J., citing *Nonnen v. Kettlewell*. (3) That case was affirmed in error on the same ground. (4) It will, however, be said for the plaintiff, that this is a re-insurance, subject to all the conditions of the original insurance; and reliance will be placed on the clause, "Outward cargo to be considered homeward interest twenty-four hours after the ship arrived at her first port of discharge." But that clause immediately follows the clause, "With leave to increase the valuation of the cargo on the homeward voyage;" and refers simply to the mode of valuation. The original policy being from Liverpool to any port of Africa and back on cargo valued at 3350*l.*, it became necessary to say, as they might increase the value of the homeward cargo, when the homeward cargo should be taken to be loaded for the purpose of valuation; and it was for that purpose alone, and not for the purpose of anticipating or putting forward the time at which the policy was to attach. The defendants have only undertaken to re-insure the homeward cargo from the loading; and the above clause having reference only to valuation cannot be imported into the present policy, so as to make the risk attach before the loading.

[BLACKBURN, J. In *Rickman v. Carstairs* (5) *Bell v. Hobson* (6) is referred to, and in that case it was held that the policy, being in continuation of others, must, notwithstanding the words "beginning the insurance upon the loading of the goods," be taken as intended to cover goods previously loaded; that is very much like the present case.]

In that case the policy was in continuation of others, and therefore it might well be meant that the risk should be taken up when

(1) 5 B. & Ad. 651.

(4) 5 B. & S. 425; 33 L. J. (Q.B.)

(2) 5 B. & S. at pp. 422; 33 L. J. (Q.B.) 57. *10 Ch. R. S. 112*

256. *10 Ch. R. S. 1068*
(5) 5 B. & Ad. at p. 663.

(3) 16 East, 176.

(6) 16 East, 240.

the other policies ceased; but this is a re-insurance, by which the plaintiff is seeking to get rid of part of his liability, and the question is, what part. He has said in distinct words, no doubt, that it is a re-insurance subject to all the conditions of the original policy: but that is as to the perils, general average, &c.; and it is distinctly said that the insurance is to commence on the loading on the coast of Africa; the risk, therefore, in the present case, had not attached, no goods having been loaded there.

Herschell, Q.C. (with him *Gully*), for the plaintiff, was not called upon.

BLACKBURN, J. Notwithstanding the able argument for the defendants, I think that our judgment must be for the plaintiff. The ordinary and general rule in the case of a policy of insurance, of course, is that we must construe the policy as we find it; it is in a printed form, with written parts introduced into it, and we are to take the whole together, both the written and the printed parts. Although it has sometimes been endeavoured to be argued that we ought to bestow no more attention on the written parts than on the printed parts which are uniform in most policies of insurance, there is no doubt that we do, and ought to, make a difference between them. The part that is specially put into a particular instrument is naturally more in harmony with what the parties are intending than the other, although it must not be used to reject the other, or to make it have no effect. One of the usual printed parts of a policy, and here it has not been struck out, is that the "insurance shall commence on the freight and goods and merchandise from the loading of the said goods and merchandise on board the said ship or vessel at as above," which would refer to the voyage above mentioned. That means that the underwriters are not responsible for the goods until they are put on board the ship for the voyage that is insured against, unless there is something stated to the contrary; and so it has been decided. But then in *Bell v. Hobson* (1), which rather derogates from that rule, Lord Ellenborough says it had been held that the words "beginning the adventure from the loading on board" were to be confined to the place from whence the risk commenced. "But," he says, "if

1872

JOYCE
v.
REALM
INSURANCE CO.

(1) 16 East, 240, 243.

1872
JOYCE
v.
[REALM
INSURANCE CO.

there be anything to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction." That I understand to mean, that if there be anything on the face of the written instrument (we cannot construe it as importing other matters) to shew that the loading was to commence at a prior time, or that the word loading was used in a sense different from the mere putting on board, then it shall prevail. In the particular case Lord Ellenborough was speaking of there was a policy on the goods, beginning the adventure upon the said goods from the loading on board the said ship, which would apparently mean goods loaded at Gottenburg; but it was stated to be in continuation of policies which were on goods from Virginia to Gottenburg, inter alia, and it being stated to be in continuation of those policies, Lord Ellenborough says, "Can there be anything more indicative of such an understanding between the parties than the statement made at the foot of this policy, that it was in continuation of former policies, which were distinctly upon a voyage from Virginia? This was taking up the voyage from the period in the former policies. The conclusion, therefore, which was drawn in *Spitta v. Woodman*" (1) (that is, that they were to be loaded during the voyage) "is completely rebutted by the reference in this policy to an antecedent loading." Now what is there in that reasoning, which seems to me to be very good sense and very just reasoning, which does not apply here? Here it is said that this is an insurance of 1000*l.*, "which insurance is hereby declared to be upon cargo, being a re-insurance subject to all clauses and conditions in the original policy, and to pay, as may be paid thereon, general average and salvage charges to be settled as per foreign statement;" and then it proceeds immediately afterwards to say "lost or not lost, at and from any port or ports, place or places, in any order, on the west coast of Africa, to the vessel's port or ports of call and of discharge in the United Kingdom. And the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above, and continue until the said goods or merchandise be discharged and safely landed at as above." If there

(1) 2 Taunt. 416.

was nothing to shew that the parties contemplated to begin earlier, or to take up a prior loading, the goods insured would appear to be goods shipped on the coast of Africa, and not the outward cargo; but when we look at the original policy, of which the present policy is a re-insurance, and is said to have all the clauses and conditions of the original policy included in it, we find a policy which, no doubt, began upon cargo at and from Liverpool to any ports in Africa, and backwards and forwards to the United Kingdom with liberty to discharge, &c., valued at 3350*l.*, "with leave to increase the valuation of the cargo on the homeward voyage, outward cargo to be deemed homeward interest twenty-four hours after her arrival at her first port of discharge." Now from that it appears that the original policy was to cover the goods that were put on board at Liverpool, the outward cargo from Liverpool, to cover the cargo whilst at Africa, and to cover the cargo homeward from Africa. I quite agree with Mr. Hill that it was quite necessary for the insured, who had leave to increase their valuation of the cargo on the homeward voyage, to say which was which; and they say that the cargo loaded at Liverpool, when it had been twenty-four hours on the coast of Africa, and going backwards and forwards, was to be considered as on the homeward voyage. So that the re-insurance, we may presume, was made after the ship had arrived on the coast of Africa, and does not cover or propose to cover any portion of the risk out to Africa. But it does appear quite as distinctly as in *Bell v. Hobson* (1), on the face of the policy, that it was intended to cover goods, as loaded in that sense at Africa, that were on board the ship twenty-four hours after her arrival there, which in the former policy was declared to be considered between the parties as part of the homeward interest. It seems to me to be clearly shewn that they did so mean; that the underwriters meant to say, "We run the risk whilst the ship is at Africa, on all the cargo that is on board at Africa, although it may have been put on board at Liverpool, for such was the prior policy that we are undertaking to re-insure." Taking that view of the matter, I think the plaintiff is right in his declaration, and that the judgment should be for him.

1872
JOYCE
v.
REALM
INSURANCE Co.

MELLOR, J. I am of the same opinion. I think *Bell v Hob-*

(1) 16 East, 240.

1872 *son* (1) an abundant authority on the question raised in this case.

JOYCE

v.

THE REALM
INSURANCE CO.

LUSH, J. I am of the same opinion. The policy in question is a re-assurance. It is an agreement by way of indemnity to the plaintiff, the underwriter on the original policy, for the risk he had incurred on the homeward voyage. He had insured out and home, and this policy undertakes to guarantee and indemnify him against the risks he had incurred upon the homeward voyage. The policy says it shall be subject to all the clauses and conditions of the original policy. The defendants' risk is stated to commence from the loading of the goods on board the ship at some port or place on the coast of Africa; but by one clause in the original policy the plaintiff had agreed, in effect, that whatever portion of the outward cargo might remain on board for twenty-four hours after the arrival of the vessel on the coast of Africa, that portion should be deemed to have been shipped upon the homeward voyage. That I take to be the meaning and effect of the words "outward cargo to be deemed homeward interest twenty-four hours after her arrival at her first port of discharge." The parties had agreed, therefore, that whatever remained of the outward cargo should be just in the same condition as to the liability of the underwriter as if it had been shipped on the coast of Africa on the homeward voyage. Then the defendants say, "We will re-insure, from the west coast of Africa home, subject to all the clauses and conditions of the former policy;" and I think that at once enables us to put a meaning upon the terms which express the time when the risk upon the goods was to commence, viz., "From the loading thereof on board the said ship." It shews that what was meant between the parties was not the actual loading, but a constructive loading, which was what the original underwriters had agreed to treat as a loading on board for the purpose of the homeward voyage.

Judgment for the plaintiff.

Attorneys for plaintiff: *Chester & Urquhart, for J. H. E. Gill, Liverpool.*

Attorneys for defendants: *Newman, Dale, & Stretton.*

EX PARTE AN ARTICLED CLERK.

1872

June 5.

Attorney—Admission—Renewal of Notice—R. (Atts.) H. T. 1853, s. 6.

An articled clerk had passed his final examination for admission as an attorney in Easter Term, and had given all the notices to entitle him to be admitted in that term; but being in his principal's service he did not apply for admission till Trinity Term, and the notices for his admission in that term had not been renewed pursuant to R. (Atts.) H. T. 1853, s. 6. A motion having been made that the examiners might be directed to admit the clerk in Trinity Term, notwithstanding that he had not renewed his notices, it was refused on the ground that the Court required a strict compliance with the above rule.

MOTION that the examiners might be directed to admit the applicant as an attorney, notwithstanding that he had not renewed the notices for admission pursuant to R. (Atts.) H. T. 1853, s. 6. (1)

The applicant, an articled clerk, had passed his final examination as an attorney in Easter Term last, and had given all the notices requisite for his admission in that term, but being in his principal's service he did not then apply for admission as an attorney. He did not renew the notices for his admission for the present Trinity Term, being unaware of the necessity for such renewal, and believing that after the notices had once been given admission could be obtained in any term. He had been appointed by the justices of certain petty sessions to be their clerk, on the understanding that he should be duly admitted during the present Trinity Term, and the failure to obtain his admission as an attorney during the present Trinity Term would be of most serious pecuniary consequence to him.

(1) R. (Atts.) H. T. 1853, s. 6:—
 "Every person so proposing to be admitted an attorney of either of the said courts, who shall have given such notices of his intention to apply for examination and admission as aforesaid or as authorized by this rule, and who shall not have attended to be examined, or not have passed the examination, or not have been admitted, may, within one week after the end of the term for which such notices were given, renew the notices for examination or admission for the then next ensuing term, and so from time to time as often as he shall think proper; and that all such renewed notices shall be added to the list of notices of admission and re-admission, and placed up on the first day of the term in the said courts, chambers, and offices, and the applicants named in such renewed notices may be examined in the ordinary way, in pursuance of such last-mentioned notices, but shall not be admitted until the last day of the term, unless otherwise ordered by one of the said courts or a judge thereof."

1872

EX PARTE
AN ARTICLED
CLERK.

Grantham, in support of the motion, urged the serious consequence that would result to the applicant in the loss of the appointment he had obtained, if the Court required a strict compliance with the rule of court, and that the Court had in the cases *Ex parte Cunliffe* (1) and *Ex parte Woolwright* (2) relaxed the rule.

PER CURIAM (Cockburn, C.J., Hannen and Quain, JJ.). In several cases lately we have refused applications similar to the present. (3) In all of them it was of importance to the parties to be admitted in the coming term. We have a standing rule from which we cannot depart, for if we depart from it in one we must depart from it in all cases. This application must be refused.

Application refused.

June 13.

[IN THE EXCHEQUER CHAMBER.]

BROWN v. NUGENT.

House kept for Public Dancing, Music, or other Public Entertainment—Licence for Music only—25 Geo. 2, c. 36, ss. 2, 3.

Under 25 Geo. 2, c. 36, s. 2, which empowers justices to license a house for public dancing, music, or other public entertainment of a like kind, the justices have a discretion to grant a licence for one of the purposes only, viz. music; and the keeper of a house with a music licence only, is liable to the penalty for keeping a house without a licence, if he permit public dancing in the house.

So held in the Court of Exchequer Chamber, affirming the decision of the Court of Queen's Bench.

APPEAL from the decision of the Court of Queen's Bench, making absolute a rule to enter a verdict for the plaintiff. (4)

This is a *qui tam* action brought by the plaintiff, a common informer, to recover a penalty of 100*l.* under 25 Geo. 2, c. 36, for keeping a house or room for public dancing without a licence.

The declaration is in the form allowed by s. 13. The plea is *nil debet* by 21 Jac. 1, c. 4, s. 4, whereon issue is joined.

(1) 15 L. J. (Q.B.) 41.

(2) 4 Dowl. 474.

(3) *Ex parte Gaches*, 23rd November, 1869; *Ex parte Meek*, 23rd November, 1869; *Ex parte Payne*,

25th November, 1869. In all these cases a similar application was refused.

(4) Law Rep. 6 Q. B. 693; where see the sections of the Act of Parliament.

The action was tried by Lush, J., at the Middlesex sittings, on the 23rd of January, 1871, when the following facts were proved. The defendant was proprietor and keeper of the Cambridge Music Hall, within twenty miles of the city of Westminster; on the 16th of November, 1870, the defendant permitted dancing in the hall by the performance on a stage of a divertissement ballet called "The Revels of the Sylphides." This ballet was performed by two dancers selected and employed by the defendant. The stage was arranged with scenic accompaniment, and a cataract of real water at the back, with nymph rising from the back. All persons who paid at the doors were admitted to the hall to view the dancing; but with the exception of the two dancers dancing the ballet, no person danced in the hall, and no dancing was permitted.

The defendant held a licence for music in the hall, duly granted to him by the magistrates of the county under 25 Geo. 2, c. 36; over the entrance to the hall was duly affixed and kept the inscription, "Licensed pursuant to Act of Parliament of the 25 of King George the Second," in accordance with s. 3 of the statute.

The jury found, that the dancing was a substantial part of the entertainment, and the music only ancillary thereto, and that the defendant kept the hall for music and dancing.

The judge directed the verdict to be entered for the defendant, giving leave to move to enter a verdict for the plaintiff.

A rule was afterwards obtained and made absolute. (1)

Day, Q.C. (R. D. Bennett with him), for the defendant.

H. T. Cole, Q.C. (Edmund Thomas with him), for the plaintiff.

The arguments were the same as in the court below.

KELLY, C.B. I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. The question arises on s. 2 of 25 Geo. 2, c. 36, and is whether, where a licence has been granted for keeping a house for public music, but without introducing the words also for public dancing, the Act is violated by the house being kept for dancing, and the holding and permitting of dancing there, as well as for public music. It has been argued

(1) Law Rep. 6 Q. B. 693; where see the sections of the Act of Parliament.

1872

 BROWN
v.
NUGENT.

1872

BROWN
v.
NUGENT.

that, if the justices have no power to grant a licence for one only of the things mentioned, a licence having been granted, it must be taken to be a licence for all the purposes mentioned in the Act. It is necessary, therefore, to determine whether the justices have power to grant a licence for music or for dancing only. I am of opinion, on the true construction of this Act, that it is competent for the justices to grant a licence for music and music only, or it is competent for them to grant a licence, if they think fit, for dancing or for public entertainments of a like kind.

Let us consider the probable object of the legislature in passing this Act, and here we must apply our knowledge and experience of human life, and of the description of houses which are to be found within the metropolis, to the question that is now before us. A house kept for purposes of public music, that is, for public entertainments, for concerts, or for the performance of single pieces by single performers on musical instruments, is totally different in its effect from a house kept for public dancing. A house may be licensed for public music at which persons may assemble, and may be productive of no mischief to the public by any such assembly. On the other hand, we know that where houses are kept and used for public dancing, mischief does sometimes arise. I imagine the legislature must have intended there should be a power to grant a licence for houses, for the purpose of musical entertainments, in many cases where it would be extremely inexpedient and dangerous or hurtful to the public to grant a licence for dancing. But passing away from what one cannot but believe was the actual intention of the legislature, let us look to the words of the Act itself: "Any room, garden, or other place, kept for public dancing, music, or other public entertainment of a like kind." Here it is put in the alternative, and if it stopped there, and the provision merely was that any house, &c., kept for public dancing, music, or other entertainments, should be duly licensed, it might raise a doubt whether the licence was intended to be for the one or for the other separately, or for both together, at the pleasure of the magistrates; but, when we find that there is a provision "That no such house kept for any of the said purposes, although licensed as aforesaid, shall be open for any of the said purposes before the hour of five in the afternoon," it seems to be manifest that the legislature con-

templated and intended that licences might be granted for one of the purposes and not the other; and we must read these words and give them their real meaning, and the only reasonable meaning that can be put upon them is, as if the legislature had said that no such house kept for any of the said purposes, although licensed as aforesaid, that is to say, whether licensed for music only, or for dancing only, or for both, should be open before five in the afternoon. No other reasonable construction can be put upon the Act of Parliament; and it therefore seems to me clear that the intention of the legislature really was that it should be in the discretion of the magistrates,—according to the place and the position of the house, the nature of the neighbourhood, the kind of persons who would be likely to assemble in such a house, and also in regard to the recommendation and the expressed opinions of the inhabitants in the neighbourhood in which the house is to be licensed,—to grant a licence for public entertainment only, or for the purpose of public dancing.

It has been observed by the learned counsel for the defendants, that the consequences of acting in pursuance of this Act of Parliament must be taken into consideration; and he has called our attention to what is well worthy of attention, which is, that all that appears outside the house, and therefore all that the public in general might possibly be acquainted with, is that the house is licensed pursuant to Act of Parliament of 25 King George II.; and no one, on reading those words without entering that house, could know whether it was licensed for music, and music only, or whether it was not also licensed for public dancing. Then anyone going in the house being licensed for music only, and finding dancing, would be liable to be seized by the police officers, and liable to be dealt with according to law. Undoubtedly this is a consequence which justifies one observing that the Act has been somewhat carelessly and improvidently framed—observations that, unfortunately, we are too often called upon, or at all events are too often justified, in making on more modern Acts of Parliament. But this is certainly to be observed, that the persons found in an unlicensed house can only be apprehended by warrant. Now no one, I apprehend, would authorize a police officer by warrant to seize a person in a house of public entertainment, who might

1872

BROWN
v.
NUGENT.

1872
BROWN
v.
NUGENT.

be there innocently, unless there were circumstances to shew that the person so found in that house was wilfully offending against the Act of Parliament. But however that may be, I think no reasonable doubt can be entertained, upon the Act of Parliament, that it is competent for the magistrates to grant a licence for music, and for music only; and in this case, they having granted a licence for music and no licence for dancing, the defendant has offended against the Act of Parliament, and is liable to the penalty; and, therefore, the judgment of the Court below must be affirmed.

MARTIN, B. I am of the same opinion. I should have thought that, if it were not competent to the justices to grant a licence for music only, then the result would be the licence would be void; and therefore the defendant kept a place for public dancing without any authority at all. But my notion is, that it appears from the Act of Parliament that it was competent for the justices to grant a licence for any one of these purposes. In my judgment the Act of Parliament says so. It says that a room kept for public dancing, music, or other public entertainments of a like kind in London or Westminster, or within a certain distance, without a licence for that purpose, shall be a disorderly house; and as I read it, I should have said it was competent for the justices to grant a licence for public dancing, or for music, or for public entertainments of a like kind; and what "public entertainments of a like kind" meant I should have thought was shewn by s. 4 of the Act, which provides that the Act shall not apply to Covent Garden, Drury Lane, or the Haymarket theatres. So that public entertainments of a like kind mean dramatic entertainments. I think s. 3 also strongly shews that a licence may be granted for one of the purposes. In order to give notice to the public, there is to be printed in capital letters, "Licensed pursuant to Act of Parliament of the 25th of King George the Second." The argument upon this was, that any person seeing this notice outside the house, might fancy when he went into the house he might either dance or sing, or hear others sing, and see them act and play. I think it would be very hard upon a man if he were to be punished when he went into a house expecting to

find it licensed for all these purposes, and finding it only for one. I think he would have an excellent claim upon Her Majesty to be relieved from any punishment. Section 3 seems to me to indicate that it was competent for the justices to grant a licence for public dancing, or for music, or for other public entertainments of a like kind; and that if the man to whom the licence had been granted to keep the room for public dancing committed a breach of the conditions, the magistrates were prohibited from giving a licence for any of the purposes aforesaid. So, if he forfeited his licence with respect to the dancing, he could never have a licence again for any of the other purposes.

1872

BROWN
v.
NUGENT.

WILLES, BYLES, KEATING, and BRETT, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Webster & Graham.*

Attorneys for defendant: *Routh & Stacey.*

1872

July 6.

BATUT v. HARTLEY.

*Detinue—Bailor and Bailee—Wharfinger—Warrants.*1872 D. 288
5 QBD 136

Certain cases of wine were ordered by L. of the plaintiff, and were shipped by the plaintiff consigned to L., who deposited the bill of lading with the defendant, a wharfinger, with directions to take delivery and warehouse the wine on L.'s account. The wine, on its arrival, was entered at defendant's wharf in L.'s name, subject to a stop for the freight. L. afterwards refused to accept the wine on the ground that it was not according to contract; the plaintiff agreed to take it back, and L. promised to send a delivery order to enable the plaintiff to obtain it; but on the same day L. indorsed the bill of lading to M., which M. took to the defendant's wharf and procured a transfer of the wine into his own name. The plaintiff was afterwards informed by L. that the wine was at the disposal of the plaintiff, but subject to charges amounting to 17*l.* 14*s.* 9*d.*, and 5*l.* for loss of profit. At an interview between M. and the plaintiff M. offered to give up the wine on payment of the above sums. The plaintiff tendered the former sum which M. would not accept. The plaintiff's attorney afterwards offered to the defendant to pay all charges, and to indemnify him against the claim of any other person. The defendant refused to deliver the wine to the plaintiff, alleging that he had given warrants to M. The wine was ultimately delivered to a third person by M.'s order. M. had in fact paid the freight, and obtained warrants to him or his order. The jury found that the transaction between M. and L. was colourable and with knowledge on the part of M. of the intention of L. to deprive the plaintiff of the wine:—

Held, power having been reserved to the Court to draw inferences of fact, that the defendant received the wine as bailee to L., and after the payment of the freight could have no better title than his bailor; that by the finding of the jury M. had no better title than L.; and, as the plaintiff had tendered the amount of charges both to M. and the defendant, the plaintiff's title was as valid against the defendant as it would have been against L.; and that the defendant was liable to the plaintiff for the value of the wine.

DETINUE for 200 cases of wine.

Pleas: 1. Not guilty; 2. Not possessed.

At the trial before Cockburn, C.J., at the Middlesex sitting after Trinity Term, 1871, a verdict was found for the plaintiff for 150*l.*, with leave to move to enter a verdict for the defendant.

The facts of the case, the course at the trial, and the arguments appear in the judgment.

April 24. *Gibbons* shewed cause.

Ingham, in support of the rule.

The following authorities were cited: *Cheesman v. Exall* (1); *Ogle v. Atkinson* (2); *Gurney v. Behrend* (3); *Wilson v. Anderson* (4); *Cuming v. Brown* (5); *Meyerstein v. Barber* (6); *Brandt v. Boulby* (7); *Williams v. Everett* (8); *Walker v. Rostron* (9); *Wood v. Leadbitter*. (10)

1872

 BATUT
v.
HARTLEY.

Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., Mellor and Lush, JJ.) was delivered by

MELLOR, J. This was an action of detinue to recover 200 cases of wine, which had been deposited by one Leah with the defendant, the proprietor of a sufferance wharf, under the following circumstances.

The wine had been ordered by Leah of the plaintiff, and was shipped by him, consigned to Leah, on the 20th of January, 1870. The bill of lading and invoice were forwarded in due course. Before the arrival of the vessel, which was on the 12th of February, 1870, Leah deposited the bill of lading at the defendant's wharf, with directions to take delivery and warehouse the goods on his account. This was done; the shipowner putting on a stop order for freight, pursuant to 25 & 26 Vict. c. 63, s. 68, and the wine was entered in Leah's name, subject to the freight. On the 19th of February, Leah, having in the mean time sampled the wines, gave notice to the plaintiff that they were not according to contract, and that he refused to accept them. A correspondence thereupon ensued, which led to no satisfactory result, and on the 19th of April the plaintiff came to London and called on Leah, when it was agreed that the wine should be taken back, and Leah promised to send a delivery order to enable the plaintiff to obtain it. This, however, he failed to do. It appeared that on the same day on which he had thus promised to deliver to the plaintiff, he had indorsed the bill of lading to Magnus, and that Magnus took it to the defendant and procured a transfer of the goods into his own

(1) 6 Ex. 341; 20 L. J. (Ex.) 209.

(2) 5 Taunt. 759.

(3) 2 E. & B. 622; 23 L. J. (Q.B.)

265. *1872-1873*

(4) 1 B. & Ad. 450.

(5) 9 East, 506.

(6) Law Rep. 4 H. L. 317.

(7) 2 B & Ad. 932.

(8) 14 East, 582.

(9) 9 M. & W. 411.

(10) 13 M. & W. 838.

1872
BATUT
v.
HARTLEY.

name. In the beginning of May the plaintiff, not having succeeded in obtaining the delivery order, called at the docks to make inquiry, and in consequence of what then took place, his attorney wrote to Leah on the subject, and received an answer that the wine was at the disposal of the plaintiff, but subject to charges which were stated to amount to 22*l.* 14*s.* 9*d.* After an ineffectual attempt to see Leah, an appointment was made to meet at the office of the plaintiff's attorney on the 27th of May, when, instead of Leah, Magnus came. He said he was ready to give up the wine on payment of the sum which had previously been named by Leah. That amount, according to an account which he then shewed, was made up of 17*l.* 14*s.* 9*d.* for charges and to 5*l.* for loss of profit. The attorney tendered the former sum, but refused to pay the 5*l.* for loss of profit. Magnus promised to see Leah and send an answer the same afternoon; but this he never did.

On the 10th of June, the plaintiff's attorney, having ascertained where the wines were deposited, called on the defendant, shewed the correspondence to his manager, and explained the transaction, and then, in order to get possession of the goods, offered to pay all the charges and indemnify the defendant against the claim of any other person. The defendant refused to deliver on the ground that he had given warrants for the wine to Magnus. Ultimately the wines were delivered up to another person by Magnus's order.

It further appeared that Magnus, into whose name the wine had as above stated been transferred on the 19th of April, had on the 3rd of June paid the freight, and obtained warrants for delivery to him or his order, and that a transfer had then been made from "Magnus" to "warrants."

Magnus stated at the trial that he had *bonâ fide* advanced money to Leah on the wine; but this was negatived by the jury, who found that the transaction between Magnus and Leah was colourable, and with knowledge on the part of Magnus of the intention of Leah to deprive the plaintiff of the wine.

The Lord Chief Justice thereupon directed a verdict to be entered for the plaintiff for 150*l.*, with leave to the defendant to move, subject to the finding of the jury, to enter a verdict for him; the Court to have power to draw any inferences of fact not inconsistent with the finding.

A rule to shew cause was accordingly granted, and was argued in last Easter Term before the Lord Chief Justice, myself, and my Brother Lush.

It was admitted that Leah, if he had been the defendant, would have had no answer to the action ; but it was ingeniously contended by Mr. Ingham, that as the defendant received the goods from the shipowner subject to his lien for freight, he stood in all respects in the position of the shipowner, and when the freight was paid, was bound to deliver according to the bill of lading ; and that the transfer by direction of Leah to Magnus, and the giving delivery warrants to Magnus, amounted to a delivery to Leah, and discharged the defendant.

We are of opinion that this argument is fallacious. The defendant received the goods as bailee to Leah, and although he might have justified detaining them on behalf of the shipowner for his freight, yet, when that was paid, he held in no other than the ordinary relation of bailee, and could have no better title than his bailor had. Then, by the finding of the jury, Magnus had no better title than Leah, and, as the plaintiff had tendered the amount of charges both to Magnus and the defendant, the plaintiff's title was as good against the defendant as it would have been against Leah. We therefore discharge the rule.

Rule discharged.

Attorney for plaintiff: *G. F. Parker.*

Attorney for defendant: *John Frost.*

1872

BATUT

v.

HARTLEY.

1872

July 6.

ARMSTRONG v. STOKES AND OTHERS.

Principal and Agent—Liability of Undisclosed Principal—Payment to Agent by Principal while still unknown to other Party.

A vendor, who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal, if the principal has bona fide paid the agent at a time when the vendor still gave credit to the agent and knew of no one else as principal.

R. & Co. were commission merchants, acting sometimes for themselves and sometimes as agents. Plaintiff, a merchant, had had dealings with them, and had never inquired whether they had principals or not, and had always settled with them. On the 15th of June plaintiff contracted to sell to R. & Co. 200 pieces of shirtings at a certain price, payment to be made in thirty days after delivery, with a discount of 1½ per cent. Plaintiff delivered the shirtings (which were grey or unbleached shirtings), and the payment ought to have been made on Friday the 25th of August. On the 24th R. & Co. asked for delay till the next pay-day, September the 1st; and while plaintiff was considering what to do, R. & Co. on the 30th of August stopped payment. It turned out that R. & Co. had bought the goods for defendants under the following circumstances—

Defendants, merchants, had been in the habit of giving orders to R. & Co. for white and grey shirtings; when white were ordered, R. & Co. went into the market, bought grey shirtings, had them bleached, and charged defendants with the price of the grey shirtings and of the bleaching, and 1 per cent. on the aggregate as their commission, with the charges of packing, &c. In previous transactions defendants had always paid R. & Co., generally in cash, i.e., on the next weekly pay-day, and had never been brought into communication with those who supplied or those who bleached the goods. In the present case defendants gave a verbal order for 200 white shirtings, the price not being named, nor the mode of payment. R. & Co. having received the grey shirtings from plaintiff, got them bleached, and sent them to defendants, charging the price at which they had bought of plaintiff, the cost of bleaching, and 1 per cent. on the aggregate of those two sums, with the charges of packing, &c.; and defendants, with perfect good faith, paid R. & Co. on the next pay-day after they received them, viz., on the 11th of August. On the above facts, the Court having power to draw inferences:—

Held, first, that the delay of plaintiff in taking no steps between the 25th and 30th of August was not laches such as would have precluded him, if otherwise entitled, from recovering payment from defendants; secondly,—assuming that there was authority, from the course of dealing between defendants and R. & Co., to establish privity of contract between defendants and those from whom R. & Co. obtained the goods,—that, after the bona fide payment by defendants to R. & Co., at a time when plaintiff still gave sole credit to R. & Co. and knew of no one else as principal, plaintiff could not come upon defendants for the price.

DECLARATION for goods sold and delivered, goods bargained and sold, work and labour, and on accounts stated.

Pleas: 1. Never indebted. 2. Payment. 3. As to the sale of the goods, a special plea (as to which see note 6).

1872

ARMSTRONG
v.
STOKES.

Issue joined on all the pleas; demurrer to third plea and joinder.

At the trial of the issues of fact before Mellor, J., at the Manchester Spring Assizes, 1871, a verdict passed for the plaintiff, with leave to move to enter a verdict for the defendants, the Court to have power to draw inferences of fact.

A rule was obtained accordingly, on the ground that there was no evidence of a contract between the plaintiff and the defendants; and also on the ground that, under the circumstances, the plaintiff had no right to come upon the defendants for payment.

June 15, 17. *Holker, Q.C.*, and *J. Edwards*, shewed cause.

Herschell, Q.C., and *Crompton*, in support of the rule.

The arguments fully appear from the judgment of the Court. In addition to the authorities noticed in the judgment, the following were referred to: Story on Agency, § 449; *Smethurst v. Mitchell* (1); *Ex parte White* (2); *Bostock v. Jardine* (3); *Horsfall v. Fauntleroy*. (4)

Cur. adv. vult. ✓

July 6. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.) was delivered by

BLACKBURN, J. (5) This was an action for goods sold and delivered. The third plea was demurred to, and issue was also taken upon it. The issue in fact was tried before my Brother Mellor, when the verdict was entered for the plaintiff, with leave to move to enter the verdict for the defendants. A rule was accordingly obtained, against which cause was shewn at the sittings after this term before my Brothers Mellor, Lush, and myself, and at the same time the demurrer was argued. We thought the plea was good, and gave judgment at once for the defendant on the demurrer (6); but on the rule the question was, whether the substance

(1) 1 E. & F. 622; 28 L. J. (Q.B.) 241, 246. *5 June 1872*

(2) Law Rep. 6 Ch. App. 397.

(3) 3 H. & C. 700.

(4) 10 B. & C. 755.

(5) The judgment was read by Mellor, J.

(6) The plea stated the facts very much as they are stated in the judgment, but it alleged in addition that Ryder & Co. were indebted to the defendants after the 11th of August up to their stoppage; and that the plaintiff negligently let the payment from Ryder

1872
ARMSTRONG
v.
STOKES.

of the plea, that is, enough of it to constitute a defence, had been proved, and in order to determine that it is necessary to state what the evidence at the trial was.

It was proved that Messrs. J. & O. Ryder & Co. were commission merchants carrying on business at Manchester, sometimes for themselves, and sometimes acting in pursuance of orders from constituents. They were not brokers professing never to act for themselves. The plaintiff, who was a merchant at Manchester, had had previous dealings with Ryder & Co., in the course of which it appeared that he had never inquired whether they had constituents or not. All former transactions had been duly settled between him and J. & O. Ryder, so that the question had never become material.

On the 15th of June, 1871, the plaintiff's salesman made a contract with J. & O. Ryder's salesman, which, as taken down in the plaintiff's book, was as follows:—"15th June, 1871. J. & O. Ryder & Co., 200 pieces 39-inch 17 square shirtings, 75 yards at 20s. 6d., 205l., 1½ per cent., 30 days." The meaning of this was explained to be that the shirtings were to be paid for thirty days after delivery, and then with a deduction of 1½ per cent. from the nominal price. As we understood the evidence, this is an ordinary mode of dealing, though the more usual terms in the Manchester market are cash, subject to a discount, varying according to the rate of interest and the agreement of the parties, the rate at this time being about 2 or 2½ per cent. When the agreement is for cash the goods are, in practice, delivered without actual payment, and the price, less the discount, is paid a few days afterwards, generally on the Friday following, that being the ordinary pay-day. When this practice is pursued, there is a period during which the seller has parted with his vendor's lien before receiving the money, though he is probably not bound to do so, as where he has, by the contract, given credit, and the period is much shorter than where credit has been stipulated for.

On the 24th of July the plaintiff sent the goods, which were

& Co. to him stand over a long time after the 25th of August when it became due, and permitted them to retain the money in their hands till they stopped

payment. The demurrer was not argued, the plaintiff's counsel at once yielding to the expression of the opinion of the Court that the plea was good.

1872

ARMSTRONG
v.
STOKES.

grey, that is, unbleached shirtings, to J. & O. Ryder, with an invoice, debiting them with the price after deducting the discount, viz. 205*l*. The period of thirty days would elapse on the 23rd of August, but, J. & O. Ryder's pay-day being Friday, actual payment would not, had all gone right, have been made till the 25th of August.

On the 24th the plaintiff received a memorandum from J. & O. Ryder, requesting him to delay applying for payment till the following Friday, September 1st. Nevertheless, his salesman did call upon the 25th, but was refused payment, and told it would be all right on the next Friday. The plaintiff saw in the newspaper an announcement of the death of one of the partners in the firm of J. & O. Ryder, and attributed the delay to this. He was, to use his own phrase in his evidence, considering what to do, but had done nothing, when, on the 30th of August, J. & O. Ryder & Co. stopped payment.

One point that was raised for the defendants may as well be disposed of here. We think that if the plaintiff had, on the non-payment by J. & O. Ryder, any right to come on the defendants, the taking no active step before the 30th was no evidence of any such laches as would deprive him of that right.

To proceed with the evidence. It was not pretended on either side that the plaintiff knew before the 30th of August that the defendants had anything to do with this transaction, so as to afford any evidence, on the one hand, that he had originally parted with the goods on the credit of the defendants, or, on the other hand, that he had elected to give credit to J. & O. Ryder to the exclusion of the defendants. But, after the stoppage of J. & O. Ryder & Co., on examining their books it was discovered that in this case they had been acting as commission merchants for the defendants, and the plaintiff's case was, that, under the circumstances, he was entitled to demand payment from the defendants, as being undisclosed principals of J. & O. Ryder in this transaction.

The evidence as to this was, that the defendants are merchants at Liverpool, who had often before given orders to J. & O. Ryder, sometimes for grey and sometimes for white (that is, bleached) shirtings. When such an order had been previously given for white shirtings, the course of business had always been for J. & O.

1872

ARMSTRONG

v.

STOKES.

Ryder to procure grey shirtings, and then to have those grey shirtings bleached, and when they were bleached to deliver them to the defendants, charging them with the cost of the grey shirtings and of the bleaching, with one per cent. commission on that amount for placing the order, and also with any charges for packing, &c., and this amount the defendants always paid to J. & O. Ryder. As the defendants knew that J. & O. Ryder were neither manufacturers nor bleachers, they were, of course, aware that J. & O. Ryder must have procured some one to supply the grey cloths and some one to bleach them; but they never were, in any of the previous transactions, brought into communication with those who supplied the goods or those who bleached them, nor did they ever inquire, nor were they ever told, who they were.

There was no running account between the defendants and J. & O. Ryder, but the defendants almost invariably paid on each transaction. It was stated in the evidence that they generally, but "not quite always," paid in cash, that is, as already explained, on the pay-day after the goods were delivered to them.

No inquiry was made on either side as to the nature of the exceptional cases in which the defendants did not pay cash. Those exceptions might have thrown light on the nature of the employment of J. & O. Ryder, or they might not.

In the present case the defendants gave a verbal order to J. & O. Ryder for bleached shirtings. Nothing was said as to the price at which they were to be procured, which was therefore left to the discretion and honesty of J. & O. Ryder; and nothing was said as to the mode in which they were to be paid for, which was, therefore, to be as usual. In consequence of this order J. & O. Ryder's manager went to the plaintiff's salesman. The manager at first wished to buy for cash, but wanted discount at $2\frac{1}{2}$ per cent. Finally they agreed to split the difference, and make it $1\frac{1}{2}$ per cent. at thirty days. All this was perfectly bonâ fide between them, and the defendants knew nothing about it.

When the grey shirtings were delivered by the plaintiff to J. & O. Ryder they sent them to the bleacher, who, as usual, cut each piece in two; and having received from J. & O. Ryder 200 pieces of grey cloth, sent back to them 400 pieces of white cloth. Ryder & Co. sent on these 400 pieces of white cloth to the defend-

ants, with an invoice dated the 2nd of August, headed as follows:—
 “Invoice of ten packages of goods purchased and forwarded per carrier to Liverpool, by order and on account of Messrs. Bates, Stokes, & Co. there” (the defendants) “by the undersigned,” &c. The defendants were in this invoice charged with the actual money which ought to have been paid to the plaintiff as the price of the goods, viz., 205*l.* less $1\frac{1}{2}$ per cent. discount, the actual charge of the bleaching, one per cent. on the amount of those two sums as commission, and the amount of some packing charges, making in all 227*l.* 10*s.* 9*d.*, noted as being due the 11th of August, which was the first pay-day after the goods would be received in Liverpool. On the 11th of August the defendants, with perfect bona fides, paid J. & O. Ryder that sum of 227*l.* 10*s.* 9*d.*

On this state of the evidence, Mr. Herschell took three points. First, he said that the defendants were not undisclosed principals, employing J. & O. Ryder as agents with authority to create privity between the unknown persons who supplied the goods and the defendants. Secondly, that even if they were, the defendants, having, before the plaintiff heard of their connection with the matter and before they heard of the plaintiff, honestly and in the ordinary course of business paid J. & O. Ryder, were no longer liable to the plaintiff. And thirdly, that the plaintiff had by laches disentitled himself to sue.

It was admitted that all that was sworn was honestly sworn, and neither counsel required anything to be left to the jury. My Brother Mellor thereupon directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendants, the Court to have power to draw inferences of fact.

The third point taken was disposed of at once; but the other two points were fully discussed, and the authorities brought before us. On these we took time to consider.

The first point depends on a question of fact, viz., what was the authority really given to J. & O. Ryder by the defendants? It is, we think, too firmly established to be now questioned, that, where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal

1872

 ARMSTRONG
 v.
 STOKES.

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1872

ARMSTRONG
v.
STOKES.

*80 p. 100
875.*

though in fact he was not. It has often been doubted whether it was originally right so to hold; but doubts of this kind come now too late: for we think that it is established law that, if on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected godsend, and is not put to take a dividend from the estate of him with whom alone he believed himself to be contracting, and to whom alone he gave credit, and to leave the trustees of that estate to settle with the undisclosed principal, subject to all mutual credits and equities between them. He may recover the price himself direct from the principal, subject to an exception, which is not so well established as the rule, and is not very accurately defined, viz., that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor.

We have first to consider whether we should draw from the evidence the inference of fact that the defendants were principals, so as to bring the case within the rule, so that if the price had not been paid by the defendants to Ryder & Co. the plaintiff would have a right to be paid the money rather than look to the trustees of the estate of J. & O. Ryder. This depends entirely on what was the real nature of the employment of J. & O. Ryder by the defendants. The defendants not being known in the matter at all to the plaintiff, there is no room for holding them bound by any apparent authority given to J. & O. Ryder. There can be no case against the defendants of holding them out as having their authority, or clothing them with ostensible authority, to a person who did not know that J. & O. Ryder had any principal at all. As to the real authority, there is evidence both ways. The charge of commission is conclusive to shew that, to some extent, there was a relation of principal and agent; the defendants were entitled to have the skill and diligence of J. & O. Ryder to get the goods as cheaply as they could; and the defendants were entitled to have the true cost of the goods debited to them with no further addition than the charges and the commission. Then Ryder & Co. did not engage to supply the goods themselves; they only undertook to find persons who would. If prices had risen after the plaintiff

made his bargain, and the plaintiff had refused to go on, the now defendants could not have sued J. & O. Ryder for this; they must either have sued the now plaintiff, if there is privity between them, or perhaps have used the name of J. & O. Ryder, as their trustees, to sue, as is suggested by Kelly, C.B., in *Mollett v. Robinson*. (1) In the invoice the defendants are not charged as purchasers from J. & O. Ryder, but are debited for goods bought by their order and on their account. This form is also evidence in favour of the plaintiff. But none of these things are conclusive. The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit. Where the constituent is resident in England, the inconvenience is not so great, and we think that, *prima facie*, the authority is given, unless there is enough to shew that it was not in fact given. It was strongly urged by the defendants' counsel, that the course of dealing and the mode of settlement by the defendants with J. & O. Ryder were sufficient to shew that J. & O. Ryder were not intended to have authority to establish privity of contract between the defendants and those from whom J. & O. Ryder obtained the goods. We agree that it is evidence that way; but we do not feel justified in finding this question in favour of the defendants. If a special jury,

1872

ARMSTRONG

v.

STOKES.

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(1) Law Rep. 7 C. P. at p. 119.

1872

ARMSTRONG
v.
STOKES.

who have knowledge of the course of business beyond what we have, had on this ground found a verdict for the defendants, we should not have been dissatisfied with it. Indeed, we feel this so strongly that, if the event of the cause depended upon this point, we should probably have given the defendants liberty to have a new trial, on payment of costs, in order that the opinion of a jury might be taken on that new trial, when the nature of the exceptions from the general habit of paying cash might also be ascertained. But it is not necessary to do this, as we have come to the conclusion that the defendants are entitled to the verdict on the second ground.

9CBD 54 It is right, in order to avoid misapprehension, to say that the phrase repeatedly used by the counsel for the plaintiff that the vendor has a right to follow the goods is, in our opinion, calculated to mislead. There are cases, such as that of *Wilson v. Hart* (1), to which such a phrase would be applicable; but those, as is pointed out in 2 Smith's Leading Cases, at p. 332 (5th ed.; p. 351, 6th ed.), proceed on the ground of fraud. In the absence of fraud, unless the person receiving the goods is a party to the contract under which the goods were sold, the vendor has no right to follow them. If the goods were bricks sold to a contractor he could not charge the owner of the house into which they were built, though he might do so if the person supposed to be the contractor turned out to be really agent for the owner of the house; and the principle is the same in such a case as the present.

The second point raised is of considerable importance. In *Railton v. Hodgson*, and *Peele v. Hodgson*, reported in a note to *Addison v. Gandassequi* (2), Mansfield, C.J., said, "If Hodgson" (the undisclosed principal) "had really paid Smith, Lindsay, & Co." (the insolvent actual purchasers), "it would have depended on circumstances whether he would have been liable to pay for the goods over again; if it would have been unfair to have made him liable, he would not have been so." This was in 1804. It is, however, to be observed, that as Hodgson had not paid either, this was not necessary for the decision. Two cases of *Waring v. Favenck* (3), and *Kymer v. Suwereropp* (4), which were tried before

(1) 7 Taunt. 295.

(3) 1 Camp. 85.

(2) 4 Taunt. 575, 577.

(4) 1 Camp. 109.

Lord Ellenborough in 1807, are generally cited on this subject, without, as it seems to us, paying sufficient attention to the fact that Kenyon & Co., in consequence of whose insolvency the questions arose, were London brokers, not commission merchants. A broker always professes to make a contract between two principals, and, though in recent times, the strictness of the rules has to some extent been relaxed, in 1807 a London broker was bound by his bond (the form of which will be found in Holt N. P. at p. 431, n.) to make known to the person with whom the agreement is made the name of his principal if required, and not to deal on his own account. In *Kemble v. Atkins* (1), it was decided that this did not prevent the broker from making the contract in his own name so as to pledge his personal credit to the seller; but still he must necessarily have had a principal. And, as is laid down in *Higgins v. Senior* (2), it was always competent, notwithstanding this form of the agreement, to shew who the person was for whom the broker acted as agent in making the contract, "so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals." In every case, therefore, where the sale is to a broker, the vendor knows that there is or ought to be a principal between whom and himself there is established a privity of contract, and whose security he has in addition to that of the broker, and the principal also knows that the vendor is aware of this and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal. The marginal note in *Kymer v. Suwercropp* (3), is, perhaps, too general, even in the case of a broker, as is pointed out by Maule, J., in *Smyth v. Anderson* (4); but what was actually decided was probably right.

The next case in order of date is *Thomson v. Davenport* (5), where Lord Tenterden, in speaking of this subject, says: "I take it to be a general rule, that if a person sells goods supposing, that at the time of the contract he is dealing with a principal, but

1872

 ARMSTRONG
 v.
 STOKES.

(1) Holt N. P. 427.

(2) 8 M. & W. at p. 844.

(3) 1 Camp. 109.

(4) 7 C. B. at p. 39; 18 L. J. (C.P.)
at p. 114.

(5) 9 B. & C. at pp. 86, 88.

1872
ARMSTRONG
v.
STOKES.

afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; *subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal.*" And Bayley, J., says:—"Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that *the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent.*"

In this case, as in *Railton v. Hodgson* (1), the freshly-discovered principal had not paid any one, and therefore the two passages above in italics were no necessary part of the decision, though they are weighty authorities as indicating the decided opinion of two judges of great experience in commercial cases.

In *Smyth v. Anderson* (2) the case arose in such a peculiar way that it is difficult to say exactly what was decided. But Maule, J., in his very elaborate and able judgment, expresses a decided opinion that the dicta of Chief Justice Mansfield and Bayley, J. (he seems not to have noticed that of Lord Tenterden), "affords a sensible rule on the subject." The latter dictum of Maule, J., adds very greatly to the weight of those which preceded. Still, there is no actual decision on the point.

On the other hand, it is stated in a note to the third edition of Paley's *Principal and Agent*, p. 249 n., that Mr. Justice James Parke was amongst those who did not acquiesce in the decision in *Thomson v. Davenport*. (3) It is not said on what authority that

(1) 4 Taunt. at p. 576, n.

(2) 7 C. B. 21, 36; 18 L. J. (C.P.) 109, 113.

(3) 9 B. & C. 78.

statement proceeds, and from the context it would seem that his dissent was rather from the extension of the rule by which the principal might be charged than from the exceptions to that rule. But in *Heald v. Kenworthy* (1) he does, as it seems to us, express dissent from the exceptions. The case itself arose on a demurrer to a plea which is set out. But then it is stated that the Court thought it might amount to the general issue, and therefore it was amended, but the report does not state what the amendments were. It is not easy, therefore, to say what was the actual decision. It does not, however, appear that in any part of the plea it was stated that the plaintiff was ignorant of the existence of the defendant as principal till after the defendant had paid the agent, nor even that the defendant believed such to be the case. Unless the plea was such as to raise the very point, the opinion of Parke, B. (like those of Mansfield, C.J., Bayley, J., and Maule, J.), is but a dictum entitled to high respect as an authority, but not binding as a decision. Parke, B., lays down generally that "if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly." After commenting on several of the cases already referred to, he concludes: "I think that there is no authority for saying that a payment made to the agent precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent." He states this as generally true wherever a principal has allowed himself to be made a party to a contract, and makes no exception as to the case where the other side made the contract with the agent believing him to be principal, and continued in such belief till after the payment was made. He certainly does not in terms say that there is no qualification of the principle he lays down when applicable to such a case; but recollecting how careful Parke B., always was to lay down what he thought to be the law fully and with accuracy, we think the counsel for the plaintiff were justified in arguing that Parke, B., thought the exception did not exist. And this is, in our opinion, a weighty authority in favour of the plaintiff's contention, more especially

1872

ARMSTRONG
v.
STOKES.

(1) 10 Ex. 739, 745; 24 L. J. (Ex.) 76, 77. *See also*

1872
ARMSTRONG
v.
STOKES.

as Pollock, C.B., assents in his judgment to the remark thrown out by Parke, B., during the argument, and afterwards more elaborately stated by him in his judgment. And Alderson, B., in his judgment, appears entirely to assent to the judgment of Parke, B.

We think that we could not, without straining the evidence, hold in this case that the plaintiff had induced the defendants to believe that he (the plaintiff) had settled with J. & O. Ryder at the time when the defendants paid them.

This makes it necessary to determine whether we agree in what we think was the opinion of Parke, B., acquiesced in by Pollock, C.B., and Alderson, B.

We think that, if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship. It may be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule. But we find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule; and without deciding anything as to the case of a broker, who avowedly acts for a principal (though not necessarily named), and confining ourselves to the present case, which is one in which, to borrow Lord Tenterden's phrase in *Thomson v. Davenport* (1), the plaintiff sold the goods to Ryder & Co., "supposing at the time of the contract he was dealing with a principal," we think such an exception is established.

We wish to be understood as expressing no opinion as to what would have been the effect of the state of the accounts between the parties if J. & O. Ryder had been indebted to the defendants on a separate account, so as to give rise to a set-off or mutual credit between them. We confine our decision to the case where the defendants, after the contract was made, and in consequence of it, bona fide and without moral blame, paid J. & O. Ryder at a

(1) 9 B. & C. at p. 86.

time when the plaintiff still gave credit to J. & O. Ryder, and knew of no one else. We think that after that it was too late for the plaintiff to come upon the defendants.

On this ground we make the rule absolute to enter the verdict for the defendants.

Rule absolute.

Attorneys for plaintiff: *Phelps & Sidgwick, for Sale, Shipman, & Sedden, Liverpool.*

Attorneys for defendants: *Field, Roscoe, & Co., for Bateson & Co., Liverpool.*

1872
ARMSTRONG
v.
STOKES.

MORGAN v. STEBLE AND ANOTHER.

Action—Bankruptcy—Pecuniary Loss.

July 6.

Declaration against defendants for a breach of duty as attorneys in not getting the best price for the equity of redemption in premises of plaintiff intrusted to defendants for sale. That defendants well knew that if plaintiff did not obtain a reasonable price, the bankruptcy of plaintiff would be the necessary and inevitable consequence, and that in consequence of defendants' breach of duty plaintiff was adjudged a bankrupt. Plea: the bankruptcy of plaintiff under the Act of 1869, and that the causes of action passed to the assignee. On demurrer:—

Held, by Blackburn, Mellor, and Lush, JJ., on the authority of *Hodgson v. Sidney* (Law Rep. 1 Ex. 313), that bankruptcy was a good defence, and that the averment that defendants knew that bankruptcy would ensue made no difference. Hannen, J., doubting whether *Hodgson v. Sidney* was not distinguishable on that ground.

DECLARATION that defendants were attorneys and solicitors carrying on business in co-partnership, and plaintiff was entitled to and interested in an estate in fee simple in possession in certain lands, premises, and buildings in the borough of Liverpool, subject to mortgages thereon, and plaintiff was also possessed of or interested in certain plant and machinery upon the said premises. And plaintiff was desirous of selling the said mortgaged premises and his interest and equity of redemption in respect of the same and the said plant and machinery. And plaintiff, at the request of the defendants, retained and employed them as such attorneys and solicitors to use due endeavours to obtain and procure a purchaser for the said estate and premises and the said plant and machinery, and to sell the same for the best price, for reasonable

1872

MORGAN
v.
STEBLE.

reward to defendants in that behalf, and defendants then well knew that if the plaintiff did not obtain a reasonable and adequate price for the said estate and premises the bankruptcy of the plaintiff would be the necessary and inevitable consequence. Yet defendants, not regarding their duty as such attorneys and solicitors under the retainer, and contriving and intending to injure the plaintiff, falsely, fraudulently, and deceitfully represented to the plaintiff that no greater price or sum than 100*l.* could be obtained on the sale of the said estate and premises and the said plant and machinery, whereas in truth and in fact a much greater price or sum could and might have been obtained for the same, and whereas in truth and in fact the person who ultimately became the purchaser had offered and was ready and willing to give a much greater price than 100*l.*, as defendants then well knew. And defendants, further disregarding their said duty, falsely, fraudulently, and deceitfully represented to plaintiff that the person who had offered a sum of 300*l.* for the said estate was another and a different person from the person who ultimately became the purchaser, whereas in truth and in fact it was one and the same person as defendants then well knew. And the defendants, further disregarding their duty, and in violation of good faith, voluntarily and unnecessarily divulged and communicated to the person who ultimately became the purchaser, whilst such person was in treaty for the purchase, that plaintiff was in embarrassed circumstances and was under an imperative and urgent necessity of selling the said estate, &c. And defendants wrongfully, fraudulently, and deceitfully prevented the said purchaser from giving a much greater price than 100*l.*, although the purchaser was ready and willing to give a much greater price, as defendants then well knew. And defendants, further disregarding their said duty, wrongfully, deceitfully, and corruptly during the treaty for the said sale, and before the completion thereof, entered into an agreement with the person who ultimately became the purchaser for the division between him and defendants of any profits that might accrue from the purchase and resale. By means of which breaches of duty, and of the false, fraudulent, and deceitful conduct of defendants, plaintiff was compelled to sell, and did sell, the said estate and premises and the said plant and machinery for a wholly inadequate price, and for a much

smaller price or sum than he otherwise might and would have obtained for the same. And plaintiff was forced and compelled to become, and did become, and was adjudicated a bankrupt, solely in consequence of the said breaches of duty and of the said false, fraudulent, and deceitful conduct of defendants. And the plaintiff also sustained great loss and suffered great trouble of mind and body and great personal annoyance, and was greatly injured in character and credit.

Plea, that after the accruing of the alleged causes of action, and before the coming into operation of the Bankruptcy Act, 1869, and before this suit, plaintiff became, and was duly adjudged bankrupt under the statutes then in force, and thereupon an official assignee of his estate and effects was duly appointed, &c., and the estate of the plaintiff, including the alleged causes of action in the declaration mentioned, before and at the time of the commencement of this suit, vested in the assignee.

Demurrer and joinder.

May 9. *Torr, Q.C.* (*W. H. Butler* with him), for the plaintiff, contended that the being adjudged a bankrupt was a personal damage to the plaintiff, which would not pass to the assignee, although pecuniary loss were involved. He cited *Rogers v. Spence* (1); *Beckham v. Drake* (2); *Wetherell v. Julius* (3); *Brewer v. Drew* (4); and distinguished *Hodgson v. Sidney* (5), on the ground that the bankruptcy itself was the wrong done by the defendants, inasmuch as it was alleged in the declaration that they knew that bankruptcy would be the consequence if the plaintiff did not get an adequate price for his equity of redemption.

R. G. Williams (*C. Russell, Q.C.*, with him,) for the defendants, relied on *Hodgson v. Sidney* (5) as directly in point. Bramwell, B., said the special damage of bankruptcy is only a consequence of the primary damage, and therefore not a separate course of action: see *Beckham v. Drake*. (6)

Torr, Q.C., in reply.

Cur. adv. vult.

(1) 12 Cl. & F. 700, 720.

(2) 2 H. L. G. 579, 597, 642.

(3) 10 C. B. 267.

(4) 11 M. & W. 625.

(5) Law Rep. 1 Ex. 313.

(6) 2 H. L. G. 579.

1872

MORGAN
v.
STEELE.

July 6. The judgment of Blackburn, Mellor, and Lush, JJ., was delivered by

BLACKBURN, J. (1). In this case the question raised on demurrer is, whether the plea of bankruptcy amounts to a good defence, the cause of action, viz., a failure to procure the best price for the equity of redemption of the plaintiff's premises entrusted to the defendants for sale, being one which undoubtedly would pass to the assignees. But it being alleged, as special damage, that "the defendants well knew that if the plaintiff did not obtain a reasonable price, the bankruptcy of the plaintiff would be the necessary and inevitable consequence," and further, "that in consequence of the breach of duty alleged, the plaintiff was in fact adjudicated a bankrupt" (this special damage being such as would not pass to the assignees), the question is, whether, under these circumstances, the plea of bankruptcy is an answer.

The case of *Hodgson v. Sidney* (2) is expressly in point against the plaintiff, unless the averment of the defendants' knowledge makes a difference. We think that it does not. The averment is not traversable. The fact of knowledge, if it existed, might have been proved as well under the declaration in *Hodgson v. Sidney* (2) as under the present declaration; and on the demurrer in that case all that was necessary to be proved in order to sustain the cause of action must have been taken as admitted.

We therefore give judgment for the defendants, leaving the plaintiff, if so advised, to question the decision of *Hodgson v. Sidney* (2) in a court of error.

HANNEN, J. I entertain some doubt whether the judgment in *Hodgson v. Sidney* (2) necessarily involves the decision of the question raised by this case. The averment contained in this declaration, that the defendants knew that the plaintiff's bankruptcy would be the "necessary and inevitable consequence" of the wrongful acts complained of, whether traversable or not, is required in order to shew the legal connection between the defendants' tortious conduct and the resulting damage which would otherwise be too remote. No such averment was contained in the declaration in *Hodgson v. Sidney*. (2) Having regard to this

(1) The judgment was read by Mellor, J.

(2) Law Rep. 1 Ex, 313.

distinction, and to the fact that the point now raised was not presented to the minds of the judges in the Court of Exchequer, I should have felt myself at liberty to consider the question as one not concluded by authority, but for the opinion of the other members of this Court. The view they take of the effect of the judgment in *Hodgson v. Sidney* (1) makes it necessary that the plaintiff, if advised to prosecute his claim, should bring that decision under the consideration of a Court of error.

1872
MORGAN
P.
STEELE

Judgment for the defendants. (2)

Attorneys for plaintiff: *Chinery & Aldridge.*

Attorneys for defendants: *Cunliffe & Beaumont.*

(1) Law Rep. 1 Ex. 313.

(2) See *Crauford v. Cinnamon*, 1r. L. Rep. 1 C. L. 3:5.

1872

June 14.

[IN THE EXCHEQUER CHAMBER.]

FOWLER AND OTHERS *v.* HOLLINS AND OTHERS.*Trover—Conversion—Broker.*

8th 17
131.
7th 88
QBD 350
354
QBD. 98

The plaintiffs sued the defendants, cotton brokers, in an action of trover, to recover the value of thirteen bales of cotton. The cotton was fraudulently bought by B. from the plaintiffs' brokers; the defendants, without notice of any fraud, bought, in their own name as principals, the cotton from B., and afterwards sold it to M. at the same price at which they had bought it, charging a commission. The defendants obtained B.'s signature to a delivery order, and took delivery of it from B.'s warehouse and conveyed it to a railway station, whence it was forwarded to M., by whom it was spun into yarn. The defendants in buying the cotton intended to act as brokers, believing the cotton would suit M. Afterwards the plaintiffs demanded the cotton from the defendants. The jury found that the cotton was bought by the defendants as agents in the course of their business as brokers, and that they dealt with it only as agents to their principal:—

Held, by Martin, Channell, and Cleasby, BB., affirming the judgment of the Queen's Bench, that the defendants were liable to the plaintiffs in trover for the value of the cotton; Kelly, C.B., Byles and Brett, JJ., dissenting.

By Martin and Channell, BB., that the defendants having bought the cotton as principals from B., it was immaterial that they intended to deal with it only as agents to their principal; and that whoever deals wrongfully with the goods of another is equally liable whether he be agent or principal.

By Cleasby, B., that by reason of the real principals not being known, and therefore not disclosed at the time the bargain was made, the defendants necessarily became the parties to the contract until the real principals being ascertained were adopted by the sellers, and by their dealing with the cotton became liable for a conversion.

By Kelly, C.B., and Byles, J., that the defendants were not guilty of a conversion, inasmuch as they acted only as brokers, and exercised no dominion over the cotton in their own right and for their own benefit.

By Brett, J., that a possession or detention, which is a mere custody or mere asportation made without reference to the question of the property in chattels, is not a conversion, and that the defendants, acting only as brokers by negotiating a bargain of purchase and sale and by passing a delivery order, were not guilty of a conversion.

Appeal by H. 22 Q. B. 275
APPEAL from the decision of the Court of Queen's Bench making a rule absolute to enter a verdict for the plaintiffs.

The action was in trover to recover thirteen bales of cotton.

Pleas, not guilty, and not possessed.

The cause was tried before Willes, J., at the Liverpool Spring Assizes, 1870.

1. The plaintiffs are merchants carrying on business at Liverpool, and the defendants are cotton brokers at that place.

1872

 FOWLER
 v.
 HOLLINS.

2. Early in December, 1869, the plaintiffs instructed their brokers, Messrs. Rew & Freeman, to sell for them thirteen bales of cotton, and shortly before the 18th of December a person named Hill, a clerk in the service of H. K. Bayley, came to the brokers of the plaintiffs and offered to purchase the cotton. The plaintiffs' brokers, however, refused to sell unless the name of a responsible person were given as purchaser. Hill thereupon stated that H. K. Bayley was buying as broker for Thomas Seddon, of Bolton.

3. The plaintiffs' brokers, having made inquiries as to Thomas Seddon, agreed to sell the thirteen bales of cotton to him.

4. Accordingly, on the 18th of December, 1869, the plaintiffs' brokers forwarded to the plaintiffs a sold note "for thirteen bales American cotton, ex *Minnesota*, at 12*d.* per lb.—buyer, Thomas Seddon, per H. K. Bayley—payment in cash within tens days less one and a half per cent. discount." The plaintiffs' brokers also sent to Bayley a bought note addressed to "Thomas Seddon, per H. K. Bayley, for thirteen bales American cotton, ex *Minnesota*, at 12*d.* per lb., subject to the rules and regulations of the Liverpool Cotton Brokers' Association. Payment in cash within ten days less one and a half per cent. discount."

5. On the same day Bayley sent to plaintiffs' brokers a sampling and delivery order for the "thirteen bales cotton, ex *Minnesota*, bought this day for Thos. Seddon, at 12*d.*"

6. Bayley accordingly obtained, on the same day, delivery of the goods, and they were removed to his warehouse.

7. H. K. Bayley had no authority from Thomas Seddon to buy for him, but the plaintiffs did not discover this until the time and in the manner mentioned in the 18th paragraph of this case.

8. On the 23rd of December H. K. Bayley saw the defendant Francis Hollins, and shewed him some samples of cotton, ex *Minnesota*. F. Hollins offered to give 11¼*d.* per lb. for the thirteen bales, and the defendant then stated that he would send in the name of his principal in the course of the day. He also bought in like manner, on the same day, other twenty-five bales of cotton from Bayley. Immediately after the agreement to buy, Bayley handed to the defendants the following memorandum: "We sell you 13 B/s. 11¼, 25 B/s. 11½. Cash to-day, per H. K. B. & Co."

1872

FOWLER
v.
HOLLINS.

9. The defendants proceeded to sample the cotton. For this purpose they sent to Bayley the following note: "Liverpool, 23rd December, 1869. Please allow the bearer to sample 13 bales cotton ex *Minnesota* @ 11½ per lb. bought this day." This note Bayley indorsed with the requisite authority to his warehousemen, and the defendants' servants at once sampled the cotton.

10. The defendants, on the morning of the 23rd of December, had received a message from Micholls, Lucas, & Co., cotton spinners at Stockport, for whom the defendants were in the habit of purchasing cotton, stating that they were coming over to Liverpool on the 23rd of December to purchase cotton through the defendants. The defendants had had no other communication with Micholls & Co. as to the buying for them on this day of this or any cotton.

11. The cotton which the defendants bought of H. K. Bayley was such cotton as the defendants were in the habit of buying for Micholls, Lucas, & Co., and at the time the defendant F. Hollins agreed to purchase the cotton from Bayley he intended to buy it as a broker and intended it for Micholls & Co., believing that it was such cotton as they were coming to buy and that it would suit them, and that on their arrival at Liverpool they would take it.

12. About half an hour after the defendants had agreed with Bayley, Mr. Micholls came to the defendants' office, and samples of the cotton having been obtained, he examined them to judge of the quality of the cotton, he inquired as to the quantity and price, and being satisfied as to these he agreed to take it.

13. The defendants have a large number of customers, and frequently, without any definite instructions, buy cotton which they, knowing their trade and requirements, believe will suit them, and feeling satisfied they will take it; but if it happens that a customer for whom they intended to buy such cotton will not take it, they trust to be able to place it with some other customer.

14. Later in the same day the defendants sent to Bayley a delivery order for the delivery to bearer of the "thirteen bales of cotton, ex *Minnesota*, at 11½ per lb. bought for Micholls, Lucas, & Co." This order was crossed "To Joseph Thompson, H. K. Bayley, per R. Hill," and indorsed "Delivered the within thirteen bales, Joseph Thompson." This was the first document which mentioned

Micholls, Lucas, & Co.'s names to H. K. Bayley. Bayley also sent in on the same day to the defendants an invoice addressed "Francis Hollins & Co.—Bought from H. K. Bayley thirteen bales of cotton, ex *Caledonia*, at $11\frac{1}{4}$ per lb., amounting to 244*l.* 19*s.* 8*d.*"

15. This delivery order was taken to the warehouse of H. K. Bayley by one of the defendants' clerks, and thirteen bales of cotton were under the supervision of the defendants' clerk delivered by Bayley's warehouseman into the cart of a carter employed by the defendants. The cotton was conveyed in the cart to the railway station, whence it was forwarded to Micholls, Lucas, & Co.'s mill at Stockport.

16. These thirteen bales were the thirteen bales obtained by H. K. Bayley from the plaintiffs as mentioned in par. 6.

17. The invoice price of the cotton, 244*l.* 19*s.* 8*d.*, was paid by the defendants to H. K. Bayley, and the same sum, with 1*l.* 4*s.* 10*d.* added for the defendants' commission, and 6*s.* 6*d.* for portorage, was paid by Micholls, Lucas, & Co. to the defendants. The defendants' course of business is to charge their customers 6*d.* per bale for cartage or portorage. The carter carrying for the defendants on certain agreed terms—the 6*s.* 6*d.* mentioned represents the 6*d.* per bale on the thirteen bales.

18. The plaintiffs not having been paid for the cotton in due time, their brokers applied to Thomas Seddon for a settlement, and were informed by him, as the fact was, that he had never authorized H. K. Bayley to purchase cotton for him.

19. They thereupon made inquiries, and learnt that the cotton had been sold and delivered by H. K. Bayley to the defendants. A demand (stating the fraudulent nature of Bayley's transaction) was made on the 10th of January, 1870, by the plaintiffs' attorneys on the defendants for the cotton.

20. This was the first intimation which the defendants received that the cotton was not, as they believed it to be, the property of Bayley. They replied to the demand of the plaintiffs' attorneys as follows: "The cotton was bought by one of our spinners, Messrs. Micholls, Lucas, & Co., for cash, and has been made into yarn long ago; and as everything is settled up, we regret we cannot render your clients any assistance."

Upon these facts, the learned judge left to the jury the questions,

1872

 FOWLER
v.
HOLLINS.

1872

FOWLER
v.
HOLLINS.

whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers, and whether they dealt with the goods only as agents to their principals.

The jury found a verdict for the defendants; the learned judge reserved leave to the plaintiffs to move to enter the verdict for them for the value of the thirteen bales.

A rule was afterwards obtained pursuant to the leave reserved. (1)

The rule was argued on the 21st and 26th of November, 1871, and the Court (Mellor, Lush, and Hannen, JJ.), made it absolute, on the ground that the defendants, in effect, bought as principals, and would have been liable to Bayley as vendees, and having dealt with the cotton as if the property were in them by assigning it to Micholls, Lucas, & Co., were liable to the plaintiffs for a conversion, on its turning out that no property had passed from the plaintiffs to Bayley. The case of *Greenway v. Fisher* (2) did not apply, and the case was not distinguishable in principle from *Hardman v. Booth*. (3)

Feb. 14. *Holker, Q.C. (Herschell, Q.C., with him)*, for the defendants, contended, first, that the defendants, having purchased the goods in the name of undisclosed principals, Messrs. Micholls, who had afterwards ratified the contract, the property in the goods passed to them; and the action ought to have been against Messrs. Micholls: *Foster v. Bates* (4); *Bird v. Brown*. (5) Secondly, that the defendants, having acted merely as brokers in negotiating the sale, their acts did not amount to a conversion. On this point, in

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(1) The terms of the leave reserved did not appear in the statement of the case for the Court of Appeal; but it was reserved in writing and was handed to the Court, and was as follows:—If the defendants, having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agents for Micholls, Lucas, & Co., and having dealt with the goods only as agents to forward them, were answerable for the value of the thirteen bales of cotton as having converted them to their own use. The defendants to be at liberty to argue, if

necessary, that the sale by Bayley under the circumstances gave a good title to a bonâ fide purchaser for value without notice.

The rule was moved on three grounds: 1. That the verdict was against the evidence. 2. Misdirection. 3. On the point reserved. The Court refused the rule on the first and second grounds.

(2) 1 C. & P. 190.

(3) 1 H. & C. 803; 32 L. J. (Ex.) 105.

(4) 12 M. & W. 226.

(5) 4 Ex. 786.

addition to the cases mentioned in the judgment, they cited *Pillott v. Wilkinson* (1); *Heald v. Carey* (2); *Greenway v. Fisher*. (3)

Kay, Q.C. (C. Russell, Q.C., with him), for the plaintiffs, contended, first, that the defendants purchased the cotton from Bayley as principals, and not as agents. Secondly, assuming they purchased as agents, that the asportation of the cotton by the defendants, for their own use or for the use of a third person, amounted to a conversion: *Bac. Abr. Trover* (B.); *Baldwin v. Cole* (4); *McCombie v. Davies* (5); *Higgons v. Burton* (6); *Hardman v. Booth*. (7) Thirdly, that every intermeddling with the property of another, with the intention to exercise dominion over it, was a conversion, and the acts of brokers, agents, or servants were not exemptions from this rule: *Story on Agency*, ss. 308, 309; *Perkins v. Smith* (8); *Cranch v. White* (9); *Tinkler v. Poole* (10); *Hardman v. Booth* (7); but that it is otherwise in the case of carriers and wharfingers: *Ross v. Johnson* (11); *Lee v. Bayes*. (12)

1872

 FOWLER
v.
HOLLINS.

Cur. adv. vult.

June 14. The following judgments were delivered:—

BRETT, J. In this case the plaintiffs, merchants in Liverpool, sued the defendants, cotton brokers in the same place, in an action of trover to recover the value of thirteen bales of cotton. The cotton had, under the circumstances set forth in the case on appeal, been in 1869 fraudulently bought by one Hill, a clerk of Bayley, a cotton broker, from the plaintiffs' brokers, Messrs. Rew & Freeman. The defendants, in 1869, bought, under the circumstances further stated in the case, and without notice of any fraud, the same cotton from Bayley, and obtained his signature to a delivery order for it, and took delivery of it from Bayley's warehouse into the cart of a carter employed by them, and conveyed it in the cart to the railway station, whence it was forwarded to Messrs. Micholls, Lucas, & Co.'s mill at Stockport, where it was

(1) 3 H. & C. 345; 34 L. J. (Ex.) 22.

(8) 1 Wils. 328.

(2) 11 C. B. 977; 21 L. J. (C.P.) 97.

(9) 1 Bing. N. C. 414.

(3) 1 C. & P. 190.

(10) 5 Burr. 2657.

(4) 6 Mod. 212.

(11) 5 Burr. 2825.

(5) 6 East, 538.

(12) 18 C. B. 599; 25 L. J. (C.P.)

(6) 26 L. J. (Ex.) 342.

249.

(7) 1 H. & C. 803; 32 L. J. (Ex.) 105.

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1872
FOWLER
v.
HOLLINS.

spun into yarn by them. In 1870, after the cotton had been so used by Messrs. Micholls, Lucas, & Co., the plaintiffs demanded the cotton from the defendants. The learned judge, Mr. Justice Willes, before whom the case was tried, left to the jury the questions, whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers, and whether they dealt with the goods only as agents to their principals. The jury found a verdict for the defendants. The learned judge reserved leave to the plaintiffs to enter a verdict for 244*l.* 19*s.* 8*d.*, the value of the cotton, if the defendants, having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agents for Micholls, Lucas, & Co., and having dealt with the goods only as agents to forward them, were answerable for the value of the thirteen bales of cotton, as having converted them to their own use. The defendants to be at liberty to argue, if necessary, that the sale by Bayley, under the circumstances, gave a good title to a bonâ fide purchaser for value without notice. An application was made to the Court of Queen's Bench to set aside the verdict as being against evidence, and to enter the verdict for the plaintiffs in pursuance of the leave reserved. The rule to set aside the verdict was refused; but a rule to enter the verdict for the plaintiffs was granted, and afterwards made absolute.

According to the interpretation put upon the findings of the jury by the leave reserved, assented to by both parties, it must be taken, I think, that the defendants in making the contract and paying the contract price, acted only as brokers and agents for Micholls, Lucas, & Co., and that, in obtaining the signature to the delivery order and in forwarding the goods to the railway station, they acted only as forwarding agents to forward goods to their principals. Upon the leave reserved, it appears to me that neither was the Court below nor is this Court at liberty to enter upon any other interpretation of the facts proved at the trial. If any other complexion is to be given to facts proved at a trial at nisi prius than that put upon them by the judge in the leave which he reserves, parties will not consent to that valuable mode of raising and determining questions of law. The question then is whether, if this interpretation be accepted, the defendants have been, in

point of law, guilty of a conversion of the plaintiffs' goods so as to be liable in an action of trover. It seems necessary, in the first place, to consider and analyze the real import of the findings of the jury. They have first found, then, that the defendants acted *only* as brokers. It seems desirable, in order to appreciate that finding, to consider the mercantile characteristics and thereupon the legal duties and liabilities of such an agent. The true definition of a broker seems to be, that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. Properly speaking, a broker is a mere negotiator between the other parties. If the contract which the broker makes between the parties be a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass until a subsequent appropriation of goods has been made by the seller and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he sign the contract, his signature has no effect as his; but only because it is in contemplation of law the signature of one or both of the principals: no effect passes out of the broker to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, neither of which is his. In modern times, in England, the broker has undertaken a further duty with regard to the contract of purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed, he passes it to the vendee. In so doing he still does no more than act as a mere intervener between the principals. He himself, considered as only a broker, has no possession of the goods, no power actual or legal of determining the destination of the goods, no power or authority to determine whether the goods belong to buyer or seller or either; no powers, legal or actual, to determine whether the goods shall be delivered to the one or be kept by the other. He is throughout merely the negotiator between the parties. And, therefore, by the civil law, brokers "were not treated as ordinarily incurring any personal liability by their

1872

FOWLER
v.
HOLLINS.

1872

FOWLER
v.
HOLLINS.

intervention, unless there was some fraud on their part." Story on Agency, s. 30. And if all a broker has done be what I have hitherto described, I apprehend it to be clear that he would have incurred no personal liability to anyone according to English law. He could not be sued by either party to the contract for any breach of it. He could not sue anyone in any action in which it was necessary to assert that he was the owner of the goods. He is dealing only with the making of a contract, which may or may not be fulfilled, and making himself the intermediary passer-on or carrier of a document, which may or may not be obeyed, without any liability thereby attaching to him towards either party to the contract. He is, so long as he acts only as a broker in the way described, claiming no property in or use of the goods, or even possession of them, either on his own behalf or on behalf of anyone else. Obedience or disobedience to the contract, and its effect upon the goods, are matters entirely dependent upon the will and conduct of one or both of the principals, and in no way within his cognizance. Under such circumstances, and so far, it seems to me clear that a broker cannot be sued with effect by any one. If goods have been delivered under a contract so made and a delivery order so passed, still he has had no power, actual or legal, of control either as to the delivery or non-delivery, and probably no knowledge of the delivery, and he has not had possession of the goods. It seems to me impossible to say that for such a delivery he could be held liable by a real owner of the goods as for a wrongful conversion to his, the broker's, own use. But then in some cases a broker, although acting as an agent for a principal, makes the contract of purchase and sale in his own name. In such case he may be sued by the party with whom he has made such contract for a non-fulfilment of it. But so also may his undisclosed principal. And although the agent may be liable upon the contract, yet I apprehend nothing passes to him by the contract. The goods do not become his. He could not hold them, even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of anything to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be the property of his principal. And although

two persons, it is said, may be liable on the same contract, each as sole contractor, yet it is impossible that two persons can each be the sole owner of the same goods; although the agent may be held liable as a contractor on the contract, he is still only an agent and has acted only as an agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor,—even though the contract should be in a form which passes property in goods by the contract itself,—by a third person, as if he, the broker, were the owner of the goods. As, for instance, if the goods were a nuisance or were an obstruction, or, as it were, trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal until then undisclosed. If he could not be sued for any other tort, merely on the ground that he had made the contract in his own name with the vendor, it seems to me that he cannot be successfully sued merely on that ground by the real owner of the goods, as for a wrongful conversion of the goods to his own use. It may be well here to notice that in the present case the broker, although he did not give the name of his principal at the time of the bargain, expressly reserved the right of naming his principal in the course of the day, and that he did so. It may be well said, therefore, that in this case he did disclose his principal. But however that may be, if all that the defendants had done in this case was to make the contract and pass the delivery order, I should have thought it clear that they would not have been guilty of a conversion of the goods in question. But the defendants in this case did more; they, through an agent of theirs, took actual possession of the goods and carried them from the warehouse to the railway station in order to forward them to Messrs. Micholls, Lucas, & Co. A question arises as to what was the nature of that asportation. Such an act might have been done with an actual intention of depriving one person of his property in the goods and of vesting the property in them in the other; as, for instance, if the defendants had had notice of the plaintiffs' claim, and had passed the goods on to the principals in the contract after such notice. In such case they would clearly be guilty of a conversion. But the jury have found that they dealt with the goods

1872

FOWLER
v.
HOLLINS.

1872

FOWLER
v.
HOLLINS.

only as agents for their principals. And the judge who tried the cause has, by the form of the leave reserved, fixed the meaning of that to be that the defendants acted only as agents to forward. That must mean, as it seems to me, that they forwarded the goods without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another. The real question in this case is whether such a possession of the goods, and such an asportation put any liability on the defendants different from their liabilities, if any, by reason of having, as brokers, made the contract and passed the delivery order. That question depends upon what is the legal definition of the term "conversion" in an action of trover. The leading authority is the note in Williams' Saunders, to the case of *Wilbraham v. Snow*. (1) As in all other questions arising upon the application of legal principles to facts, there are some cases about which there is no doubt. Where one, with intent to make them his own, actually takes as his own, or actually destroys or actually uses as a man uses his own, the goods of another, it is not difficult to determine that he has done an act intentionally inconsistent with the dominion of anyone but himself as real owner of the goods, and has been guilty of a wrongful conversion of the goods. It is easy to understand how it was held that in such cases the innocence of the defendant, in the sense of his not knowing who the real owner was, or that the person from whom he immediately took the goods, was not the real owner, was immaterial; the defendant has taken the goods with intent that they should be his own, or has used them as if they were his own. Such acts must necessarily be contrary to the rights of a real owner who has not authorized him so to take or so to use. So if one be in possession of goods under the belief that he has a right to maintain possession, and they be demanded of him and he absolutely refuse to deliver them, he has intentionally exercised over them a dominion intentionally inconsistent with the alleged right of him in whose name they were demanded, and in such case it is not difficult to say that the defendant, if the demand was made on behalf of the real owner, has been guilty of a wrongful conversion. But it is where one has dealt with goods as if they were his own without having had possession

(1) 2 Wms. Saund. 47 d.

of them, or where one has taken goods into his possession, but not with intent that they should be his own, or without reference to their being the property of one person or of another, or having goods in his possession has not used them as his own, and where no demand has been made on him for a delivery of the goods to or on behalf of the real owner whilst they were in his, the defendant's, possession, that the real difficulties arise. As to the first, I think it may be rightly said that in no case can a man be guilty of a conversion who has not by himself or his agent had possession of the goods in dispute. A man might, I apprehend, be guilty of a conversion, though he had had possession only by his agent; as if he had authorized an agent to take goods for him, or to use or destroy them, and the agent had obeyed his commands; but if the order had been given and had not been obeyed, I apprehend that the mere order would not be a conversion. So if one enters into a contract to sell, as if they were his own, the goods of another, whether the form of the contract be such as would assume to pass the property at once, or such as could only pass the property on a subsequent delivery, I apprehend that the mere fact of making such a contract is not a conversion.

These propositions seem to me to be assumed or decided in the first point decided in *Lancashire Waggon Company v. Fitzhugh*. (1) The real difficulty is where the defendant has had the goods in his actual possession. It is clear that he is not in such case always liable for a conversion, and equally clear that in some such cases he is liable. He is clearly not liable, though he has had actual possession of goods, if he has held them or has assumed to hold them for the real owner. He is clearly liable, as has been said, if he has taken the goods as his own, or has used them as if they were his own, or has upon demand by or on behalf of the real owner refused to give them up. The more material cases in the present case are those in which the defendant has been held not guilty of a conversion, although he has had actual possession of the goods, not as agent for the real owner, but as agent for others. These cases require careful attention. In *Bruen v. Roe* (2) the proposition is thus stated: "If in trover and conversion an actual taking of goods is given in evi-

1872

FOWLER
v.
HOLLINS.

(1) 6 H. & N. 502; 30 L. J. (Ex.) 231.

(2) Sid. 264.

1872
FOWLER
v.
HOLLINS.

dence, that is sufficiently good without proving a demand and denial, as the taking of my cap from my head; for that is actual conversion; but when the thing comes by trover there ought to be an actual demand and refusal." The actual taking there described is a taking intentionally without or against the consent of the person in possession. The trover implies an actual possession, but is held to be insufficient to constitute a conversion, because consistently with it the defendant may not be claiming anything more than the mere custody of the goods. In *Ross v. Johnson* (1) the defendant, a wharfinger, had had actual possession of the plaintiff's goods without the authority of the plaintiff. But Lord Mansfield held that the mere fact of such a possession was not evidence of a conversion. "It is impossible," he said, "to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger. But in order to maintain trover there must be an injurious conversion." The phrase hardly seems to help; but the decision upon the facts seems to me to be, that a mere custody of goods without any intention as to the property in them is not a conversion.

In *Greenway v. Fisher* (2) one of the defendants was a packer, who in the regular discharge of his duty had, according to directions from persons wrongfully in possession of the plaintiff's goods, packed and shipped the goods. Lord Tenterden held that there was no conversion by such defendant, although he had had actual possession of the goods and had packed and shipped them. These were acts surely inconsistent in fact with the plaintiff's right of dominion. "On the part of Woodward" (one of the defendants), says Lord Tenterden, "reliance is placed, and I think properly, on the circumstance of his acting in the ordinary course of his business, and I am of opinion that the course of trade in this instance furnishes an exception to the general rule. The distinction between this case and that of a servant is, that here there is a public employment; and as to a carrier, if, while he has the goods, there be a demand and a refusal, trover will lie; but while he is a mere conduit pipe in the ordinary course of trade, I think he is not

(1) 5 Burr. 2825.

(2) 1 C. & P. 190.

liable." The terms of this judgment seem to me to be hardly satisfactory. The mere fact that the defendants' employment was a public one cannot be the reason. Almost every trade is a public employment. But the butcher who should kill and cut up the plaintiff's beast, or the spinner who should spin his cotton into yarn, would be guilty of a conversion, although the trade would be equally a public employment as that of a packer. The meaning of the expressions must be gathered from the facts of the case. It is that the known nature of the employment of a packer, like that of a carrier or wharfinger, known because it is public, shews that although he has had actual possession of and has made an actual asportation of goods, yet his possession was only a custody, and his asportation was made without reference to or consideration of the question of whose property the goods were.

In *Fouldes v. Willoughby* (1) the defendant took the horses from the plaintiff, who was holding one of them by the bridle, against the will of the plaintiff, and put them on shore. The judge at the trial told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion. But the Court held that he was wrong. "In my opinion," says Lord Abinger, "he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. It has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion of the chattel."

In *Burroughes v. Bayne* (2) Martin, J., gives a definition of the word "conversion." "It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." But by the words, "so as to deprive" must, I think, where there has been nothing but a detention, be intended "with intent to," or the definition includes the cases of a carrier, wharfinger, packer, and a mere servant acting only as such without notice or

1872

 FOWLER
v.
HOLLINS.

(1) 8 M. & W. 540.

(2) 5 H. & N. 296, 302; 29 L. J. (Ex.) 185.

1872

FOWLER
v.
HOLLINS.

demand. Channell, B., distinguishes between an "asportation" and a "simple asportation," and distinguishes them according to the intention of the defendant. This judgment seems to me to shew that mere actual possession, if only with the intent to have custody of the goods, without reference to the question of property in them, is not a conversion; and that an asportation or actual removal and delivery of goods, if it be only a simple asportation, i.e., if it be done with intent only to be a carrier of the goods, without reference to the question of property in them, is equally no conversion.

In *Lancashire Waggon Co. v. Fitzhugh* (1) it was held that the mere sale of goods by a sheriff, who had seized them, and who sold bonâ fide and without notice, was not a conversion. The new assignment was sustained because it averred that the sheriff not only delivered the goods but caused the purchasers to use and damage the waggons. That allegation goes further than a mere asportation and delivery as a mere means of conveyance; and if it rested only on the delivery, as I think it might, it is because the delivery under a sale by a sheriff or by an auctioneer is a delivery with intent to pass the property, and so more than a simple asportation and delivery.

The true proposition as to possession and detention and asportation seems to me to be, that a possession or detention, which is a mere custody or mere asportation made without reference to the question of the property in goods or chattels, is not a conversion. This seems to me to be the proposition also to be deduced from the American cases which are ably set forth in the 3rd vol. of Robinson's Practice of Courts of Justice, pp. 452-462. "The idea of property," he says (p. 459), "is of the essence of a conversion." He then quotes the judgment of Wardlaw, J., in the case of *Nelson v. Whatmore*. (2) "This action was brought to recover the value of a slave named Frank, a man of doubtful colour, who was passing as free in a public conveyance, and was taken as his servant by the defendant; and the case turned upon the inquiry whether the defendant knew Frank to be a slave. 'If he did not, the treatment of Frank as a servant, and consequent facilities of escape afforded to him, may,' said Wardlaw, J., 'have been acts

(1) 6 H. & N. 502; 30 L. J. (Ex.) 231.

(2) 1 Richardson, 323.

in themselves lawful, certainly did not indicate an assertion of property.” In this case there were, as must be seen when it was proved that in fact Frank was the plaintiff’s slave, possession and use by the defendant; but under the circumstances, that is, on account of the want of knowledge that the man was a slave, a possession and use without reference to any question of property in the plaintiff, the defendant, or anyone else.

On the whole, therefore, I come to the conclusion that a broker who, acting only as such, negotiates a bargain of purchase and sale and passes a delivery order is not thereby guilty of a conversion, so as to be liable in an action of trover; and that in this case the asportation, which we are bound to consider, according to the leave reserved, as a simple asportation, without reference or intention as to whose was the property in the goods, is likewise not a conversion. In my opinion the judgment of the Court of Queen’s Bench ought to be reversed.

BYLES, J. I concur in the judgment of my Brother Brett. I have had the advantage of reading the judgment of my Lord Chief Baron, and, as it is impossible for me to add anything to it, I merely wish to state that I agree with the reasons on which it is founded.

MARTIN, B. My Brother Channell concurs in the judgment I am about to deliver.

This is an appeal from a judgment of the Court of Queen’s Bench, and the question is whether certain acts of defendants, done under certain circumstances to thirteen bales of cotton, are, in law, a conversion within the meaning of that term in an action of trover. The origin of the action of trover is, I believe, correctly stated in *Burroughes v. Bayne* (1); it was founded on a fiction which at one period it was deemed within the authority of courts of law to invent, and further, to prohibit any contradiction of. The object of this fiction was to get rid of wager of law, which existed in the action of detinue. Bramwell, B., in the above case, much objected to the word “conversion,” and when there is a word in common and ordinary use, with a well understood popular

1872

FOWLER
v.
HOLLINS.

(1) 5 H. & N. at p. 302; 29 L. J. (Ex.) 185.

1872

FOWLER
v.
HOLLINS.

meaning, it is to be lamented that it should be used in a legal sense with an artificial and "conventional" meaning. But as regards the action of trover I think it is well settled that the assumption and exercise of dominion—and asportation is an exercise of dominion—over a chattel inconsistent with the title and general dominion which the true owner has in and over it is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person. This is stated to be the legal meaning of the term conversion by Alderson, B., in the case *Fouldes v. Willoughby*. (1) I believe all the cases that exist were cited in the argument by the learned counsel, but it is unnecessary to refer to them as they are collected in a note (a) by Sir E. V. Williams, in his last edition of Saunders' Reports, vol. ii. p. 108: *Wilbraham v. Snow*: and the result is what I have stated. The case of the carrier was referred to as inconsistent with the above definition. The trade of a common carrier is one of few occupations which the person carrying it on is bound by law to exercise upon the requirement of a person bringing him goods to be carried, and it would be unjust that he should be bound by law to do an act which the law, in the event of the person bringing the goods not being the true owner, declared to be an unlawful act; it has, therefore, been deemed that the carrying of goods by a carrier from terminus to terminus, upon the requirement of a person wrongfully in possession of them, is not a conversion, although, if the true owner intervenes before the goods be delivered and demands them, and the carrier refuses to deliver them, he is liable in an action of trover. But the case of *Greenway v. Fisher* (2) was mainly relied on for the defendants. It was trover for calico. The plaintiff had entrusted it for sale to Messrs. E. & Co., and they had pledged it to two of the defendants for money lent; but the defendants had employed one Woodward (a third defendant) a packer, to pack it, and he had done so and shipped it at the Custom House, making an affidavit that he was the real owner; it was objected that Woodward was not liable, as he had only acted in the regular discharge of his duty. Abbott, C. J., is stated to have said that the circumstance of Woodward acting in the ordinary course of business, and in

(1) 8 M. & W. 540.

(2) 1 C. & P. 190.

the course of trade, made an exception to the general rule; and that the distinction between the case and the case of a servant was that this was a public employment; he referred to the case of the carrier, and said he was a mere conduit pipe. A verdict was taken for Woodward. It does not appear that this ruling has ever been acted upon except in the present case; there was no opportunity of taking the opinion of the Court above upon it, as there was a verdict against the other defendants; and notwithstanding the high authority of Abbott, C. J., should a similar case occur, I think it would be a matter to be reconsidered. I do not think that the employment of a packer is a public employment like that of a common carrier for hire. Nor is he bound by law to exercise his employment except at his own pleasure.

The facts of the present case are these. The plaintiffs were the true owners of thirteen bales of cotton, the possession of them had been obtained by a person called Bayley by a fraud. On the 13th of December, 1869, the defendants bought the cotton from Bayley, for cash payable the same day, and proceeded at once to sample it, i.e., to take a portion out of each bale, which their servants did, and about half an hour afterwards they exhibited these samples to a Mr. Micholls, who examined them in order to judge of the quality, and having inquired as to the quantity and price, agreed to take the cotton. It is not stated that Bayley's name was mentioned to Mr. Micholls, but the price was stated, and he agreed to buy it and afterwards paid the price, with the addition of 1*l.* 4*s.* 10*d.* for commission and 6*s.* 6*d.* for portorage. The next step was that the defendants sent one of their clerks with a cart driven by a carter paid by them to Bayley's warehouse. The cotton was delivered to the clerk, loaded on the cart, and taken to the railway station from whence it was forwarded to Mr. Micholls' firm, at Stockport, and the price was paid by them to the defendants. These are the acts which the plaintiffs rely on as constituting the conversion: the defendants took the cotton into their corporeal possession, they carted it from Bayley's warehouse to the railway station, and delivered it there to be forwarded to Mr. Micholls, at Stockport, knowing that it was intended to be spun into yarn, and received the price. This is, to my mind, a conversion within the above definition. But it is alleged that there was no conversion by reason of the following

1872

 FOWLER
v.
 HOLLINS.

1872

FOWLER
v.
HOLLINS.

742172

circumstances. The defendants were cotton brokers, and the firm of which Mr. Micholls was a partner were their customers. On the morning of the 23rd of December they received a message from the firm, stating that they were coming over to Liverpool that day to purchase cotton through them. The cotton which they bought of Bayley was such cotton as the defendants were in the habit of buying for Mr. Micholls' firm, and when they purchased the cotton from Bayley they intended to buy it as brokers for the firm, believing that it was such cotton as they were likely to buy, and that it would suit them, and that on their arrival at Liverpool they could take it. The defendants had many customers, and frequently buy cotton in this way believing that it will suit, and feeling satisfied that their customers will take it, or if not, that they could be able to place it with some other customer. The learned judge who tried the cause left two questions to the jury. First, whether the thirteen bales of cotton were bought by the defendants, as agents, in the course of their business as brokers; and, secondly, whether they dealt with the goods only as agents for their principal. The jury found both questions in the affirmative, and the verdict was entered for the defendants. In one sense this finding was correct. I have no doubt the defendants throughout meant to act as brokers; but in another sense I think it incorrect. I think the facts shew a sale by Bayley to the defendants, and a resale by them to Messrs. Micholls, and that however confident the opinion or expectation of the defendants may have been that Messrs. Micholls would take the cotton, I do not think they stood to them in the relation of principals; and in my opinion Bayley, had he been the true owner of the cotton, could not have maintained an action against them for the price, and his only remedy would have been against the defendants. For the present purpose, however, we must assume that the verdict was right, and in my opinion the facts found by the jury are immaterial. The plaintiffs were strangers to the sale by Bayley, whether it was to the defendants or to Mr. Micholls. I think they are entitled to treat the defendants as wrongdoers, wrongfully intermeddling with their cotton, which they had no legal right to touch; and that when they removed the cotton from the warehouse, where it was deposited, to the railway station to be forwarded to Stockport to be spun into yarn, and

received the price of it, they committed a "conversion." What does it concern the plaintiffs whether the defendants dealt with the cotton and acted as brokers or agents, or principals: they may not have known what the defendants were? Their acts towards the cotton were the same whether they filled the one character or the other. They dealt with them as men committing a wrong and tort towards the plaintiffs' chattel, and in my opinion the acts which they did constitute what the law deems a conversion, notwithstanding that they acted as brokers or agents. It was well put by the learned counsel for the plaintiffs, that suppose the defendants had bought the cotton for a foreign principal, and instead of carting the cotton to the railway station had carted it to the docks to be put on board a steamer to forward it to Bordeaux; could it be that the plaintiffs were bound to go to France to recover the value of their cotton and have no remedy against the defendants? There is no doubt that the plaintiffs could maintain some action against the defendants, who, without lawful authority, intermeddled with their cotton, and in my opinion the action is trover. It may be that, upon this principle, persons may be made liable for the value of a chattel by reason of a very trifling act; but I doubt whether the law could be advantageously altered. It was said that the defendants were innocent of all intention of wrong. There is no doubt of this; but the plaintiffs and Messrs. Micholls were equally innocent, and there can be no doubt that the plaintiffs could have maintained an action of trover against Messrs. Micholls. They actually converted the cotton in the popular sense by spinning it into yarn; and when a loss must fall upon one of the innocent parties the consideration of hardship ought to be altogether put aside, and the loss imposed where the law casts it: see *Stephens v. Elwall*. (1) I am of opinion that the judgment of the Court of Queen's Bench was right, and ought to be affirmed.

I have, since the above was written, had an opportunity of reading my Brother Brett's judgment. I quite agree, in the case he puts, viz., A., real owner of goods, which were in wrongful possession of B., with no power to sell, who employed a broker to sell, who sold them to C., and all that the broker did was to send bought and sold notes to B. and C., that no action of trover or any

(1) 4 M. & S. 259.

1872

 FOWLER
 v.
 HOLLINS.

other action could be maintained by A. against the broker. He did nothing but make a contract which was utterly void against A. It is like the sheriff's case referred to by my Brother Brett. (1)

But that is not the present case, here the defendants bodily intermeddled with the goods. I further agree that we must take the finding of the jury to be a part of the case, and must take it: first, that the cotton was bought by the defendants as agents in the course of their business of brokers. This, I presume, means that cotton brokers deal with cotton in the same manner as the defendants dealt with this parcel. For no one can doubt but that the defendants bought the goods as principals from Bayley: secondly, that they dealt with them only as agents to their principal. This finding, as I have said, is in my judgment immaterial: whether a man who deals wrongfully with my goods be an agent or principal seems to me to be of no consequence.

CLEASBY, B. (2) I agree in the judgment of my Brother Martin; but I wish to add a few words to shew that I agree substantially with the reasons given by the learned judges in the Court of Queen's Bench, and I do not think that when properly considered they are at variance with the finding of the jury.

It was an action of trover to recover the value of certain cotton, and there being a plea of not guilty the question was whether there was sufficient evidence of a conversion. The defendants were brokers, and the jury found that in dealing with the cotton the defendants had acted in their character of brokers and not as principals; and the defendants contended that this finding, when applied to the circumstances of the case, had the effect of negating a conversion by the defendants.

In order to apply this finding it is necessary to consider the facts as stated in the case on appeal; and I may as well at once indicate what my conclusion is, viz., that, although the defendants never intended to buy on their own account, and to act in any other character than that of brokers; and although the sellers never understood them to buy on their own account as the real

(1) *Lancashire Waggon Co. v. Fitzhugh*, 6 H. & N. 502; 30 L. J. (Ex.) 231. (2) This judgment was read by Martin, B.

principals, or to act in any other character than that of brokers (as the jury quite properly found), yet by reason of the real principals not being known, and therefore not disclosed at the time when the bargain was made, the defendants necessarily became the parties to the contract, until the real principals being ascertained were named and adopted by the sellers as the persons they would look to. The plaintiffs were the owners of thirteen bales of cotton, of which a person named Bayley, who carried on business as a cotton broker under the firm of H. K. Bayley & Co., had obtained possession by means of a fraud. Paragraph 8 states the transaction between Bayley and the defendants. It appears from the statement there that the defendants, who were known to be acting as brokers, having been shewn samples of cotton "*ex Minnesota*," agreed to buy the thirteen bales at the price of $11\frac{1}{4}d.$ per lb., and they were to send the name of their principal in the course of the day. They also agreed at the same time to buy twenty-five other bales; and the following memorandum was handed by Bayley to the defendants: "We sell you 13 B/s $11\frac{1}{4}$,—25 B/s $11\frac{1}{4}$. Cash to-day per H. K. Bayley & Co."

It seems clear that this was not a conditional transaction (I mean conditional upon the name of the principal being sent in), but an absolute sale between Bayley and the defendants. The defendants being brokers wished to secure the sale of the cotton and were content to bind themselves, having no doubt as to finding a purchaser, and Bayley was satisfied with the price and the responsibility of the defendants, although the defendants were not to buy as real principals and sell at a profit, but as brokers for a principal whose name was to be given. It would be most unreasonable to suppose that Bayley was to take as principals any persons whatever whose names the defendants sent in, whether he approved of them or not, or that the contract should be conditional upon his approving of them. And accordingly it was not contended before us that the transaction was a conditional one, but that the defendants were acting as brokers in the transaction, as was undoubtedly the fact.

That being so, it was necessary that the defendants, in order to find principals, or (which is the same thing) purchasers, should require samples of the thirteen bales, the subject of the contract;

1872

FOWLER
v.
HOLLINS.

1872
FOWLER
v.
HOLLINS.

and they apply to Bayley, as I apprehend they had a right to do, and their servants take the samples. It appears to me that it might well be contended that this taking the samples out of the thirteen bales which formed the subject of sale to them was exercising an act of ownership. For as soon as the thirteen bales were ascertained, the defendants had a right to deal with them subject to any claim which Bayley, as unpaid vendor, might insist upon, which he does not appear to have done.

But it is not necessary to insist upon this act of ownership as a conversion, because what takes place afterwards on the same day makes the matter, in my opinion, quite clear. As soon as Micholls, Lucas, & Co. agree to buy the cotton, the defendants send a delivery order to Bayley, in which the name of their principals, Micholls, Lucas, & Co., is given according to their engagement. This delivery order was to deliver to the bearer, who was Thompson, the servant of the defendants; and accordingly Bayley writes across it, "To Joseph Thompson," and signs this, and Thompson endorses a receipt for the cotton: see paragraph 14.

It thus appears that the delivery was not to Micholls, Lucas, & Co. (who would have to settle with the defendants for the price before they were entitled to delivery), but to the defendants; and accordingly, after this has been done, and the cotton has been weighed, Bayley sends in his invoice for the cotton; and although the name of Micholls, Lucas, & Co., the real principals, had been disclosed, the invoice is sent in to the defendants, and they are made the debtors. The invoice is set out in paragraph 14, and headed thus: "Messrs. Francis Hollins & Co. Bought from H. K. Bayley & Co." It is plain, therefore, that Bayley refused to deal with Micholls, Lucas, & Co. as principals; and held the defendants as the persons responsible to him as buyers, which he was entitled to do, no principal having been disclosed when the contract was made. It was therefore in this right, as the persons entitled to the possession of the cotton as buyers from Bayley, that the defendants obtained possession of it for the purpose of transferring the property in it to their principals, Micholls, Lucas, & Co., and this dealing with the property appears to be a clear conversion upon all the authorities. The defendants acted as brokers, but from the circumstances attending the contract they became themselves interested in it.

I wish to add, that in my opinion it is not necessary to overrule *Greenway v. Fisher*. (1) That case is like the case of shoeing a horse, or mending a watch, and sending it home. It is true that the shipment was in the name of the defendant, but no one would suggest that by writing his name in as owner he intended to claim the property or to deal with the property. It was only complying with the directions as to sending the goods back, and the entry of the name was a necessary form for the purpose. In that case there was no intermeddling with the property in the chattel; in the present case all that is done is for the purpose of transferring the property.

The action of trover is not founded upon contract or upon any particular relation of the parties, but upon property, and supposes the owner to have lost the goods, as the plaintiffs may in some sense be said to have done in this case; and the liability under it is founded upon what has been regarded as a salutary rule for the protection of property, namely, that persons deal with the property in chattels or exercise acts of ownership over them at their peril.

No one could dispute that if the defendants had made a subsale of the cotton they would have been responsible, though they bought it and paid for it in the ordinary way; and if they are not responsible in the present case it follows that they could, at their option, select any persons they thought proper to deliver the cotton to, and make the persons so selected by them the only persons responsible to the plaintiffs, the real owners.

KELLY, C.B. In this case, but for the finding of the jury, I should have been prepared to agree with the learned judges of the Queen's Bench, that there was evidence to be submitted to the jury of such a conversion by the defendants as might have sustained this action, though I am by no means satisfied that any such verdict ought to have been found. But after carefully considering the judgments of the learned judges, I do not see that any effect is given to the finding of the jury, and it seems to be assumed that the defendants acted in the transaction as purchasers and sellers, and not as brokers.

(1) 1 C. & P. 190.

1872

FOWLER
v.
HOLLINS.

96887

1872

FOWLER
v.
HOLLINS.

It is necessary, therefore, to look to what the jury have expressly found, and consider its effect upon the case as it is now before us upon a motion to enter a verdict for the plaintiffs. The questions left by my Brother Willes to the jury were whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers, and whether they dealt with the goods only as agents to their principals; and upon both points the jury found for the defendants.

Before, therefore, the defendants could be treated as principals in the sale and purchase of the goods, it seems to me that these findings of the jury should have been set aside. But not only has this not been done, but it was stated at the bar, and not denied, that a motion had been made in the Queen's Bench to that effect, and a rule refused. The defendants then having throughout acted as brokers and dealt with the goods only as agents to their principals, it would be to extend the doctrine of conversion far beyond the operation of the authorities cited at the bar, to hold that they were more than conduit pipes (to use the expression of Lord Tenterden) between Bayley and Micholls & Co., or that they were guilty of a conversion in merely negotiating the purchase and sale, and assisting as agents in the transfer of the goods from Bayley to Micholls & Co. It is true that as Micholls & Co. were not named at the time of the purchase, the vendor might have held the defendants personally liable; but as the price was paid to the vendor, and with the money of the real purchasers, the defendants receiving only their commission as brokers, it does not appear to me that this circumstance altered the character of the transaction, and made the acts of the defendants to amount to a conversion.

I cannot think that the doctrine of conversion, as applied to transactions effected openly *bonâ fide* and in the ordinary course of the business of merchants and brokers in London or Liverpool, should be extended in the smallest degree beyond the necessary result of established decisions. And the logical and exhaustive judgment of my Brother Brett, which I have had an opportunity of reading, seems to me to shew that brokers are not more within the scope of those decisions than carriers or packers. Why should a broker who negotiates a contract between buyer and seller, in his character of broker, being the mere medium of communication between

the one and the other, and deriving no other benefit from the transaction than his commission, be made liable for the whole value of the goods purchased and sold, any more than the packer who packs and ships the goods, or the railway company that conveys them from the seller's to the purchaser's premises? And that because the real owner has permitted himself to be defrauded of them by the pretended sellers. Surely in such a case where one of two innocent parties must sustain a loss, it should be he who by having entrusted his property to an untrustworthy person has enabled or facilitated the commission of the fraud by which the loss has been occasioned.

It is true that a conversion has been correctly defined to be the exercising of dominion over property inconsistent with the title of the owner. But justice, expediency, public policy, and common sense, have introduced exceptions or qualifications to this doctrine. A carrier, who delivers a quantity of merchandise to one who claims and receives it as owner, a packer, who packs and prepares for shipment and actually ships and consigns goods to one who receives and deals with them as his own, exercises dominion over them adversely to and inconsistent with the rights of the true owner. Why then should not a broker, who interferes in the transfer of goods, not in his own right or on his own account, or claiming them as his own, but as the medium only between the vendor and the purchaser, deriving no benefit from the transaction except his commission, be held equally within the exception which has been applied to carriers and packers? Considering the vast number and variety of the transactions effected, and the immense amount of property dealt with by brokers acting in the ordinary and accustomed course of business, in London and Liverpool, and other great commercial towns, it seems most unreasonable and unjust that they should be bound to inquire into the titles of all the sellers of all the merchandises in respect of which they negotiate contracts as brokers, or incur the risk of being compelled to make good the value to some unknown owners, who have been imprudent enough to part with them to a dishonest person, in whom they have reposed a misplaced confidence. Then can it make any difference that the broker, acting under a *del credere* commission, or otherwise, as by contracting for an unnamed principal, makes

1872

FOWLER
v.
HOLLINS.

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1872
FOWLER
v.
HOLLINS.

himself personally liable? I think not, and that he must still be treated as an agent only. If he were so liable, a mere collateral surety for the acceptance or delivery, or the payment of the price of goods, might be held guilty of a conversion without having interfered in the transaction except by becoming such surety. It may be true that in some cases the taking of samples or the carting and delivery of goods may be a conversion by a purchaser, who treats them as his own; but a broker who does these acts, in the capacity of broker only, is no more guilty of a conversion than an officer at the London Docks who draws samples of wine in a warehouse, or a railway carrier who sends his own carts, and conveys goods between the railway and the premises of the consignor and consignee. The case of goods sent abroad, where they cannot be traced and followed by the owner into the hands of the purchaser, rests altogether upon an exceptional principle, which I think inapplicable to the present case. And on the ground that the defendants here have acted as brokers and brokers only, and have exercised no dominion over these goods in their own right and for their own benefit, I am of opinion that they are not guilty of a conversion which will support this action, and the verdict they have obtained ought not to be disturbed.

Judgment affirmed.

Attorney for plaintiffs: *Wynne.*

Attorneys for defendants: *Chester & Urquhart, for Lace, Banner, & Co., Liverpool.*

THE MERSEY DOCKS AND HARBOUR BOARD, APPELLANTS;
THE OVERSEERS OF LIVERPOOL, RESPONDENTS.

1872

May 29.

Poor-rate—Parochial Earnings and Acreage Principles—Rating of Docks in several Parishes.

8QB. 44

The appellants were the owners and occupiers, under Acts of Parliament, of docks in different parishes on both sides of the river Mersey, which docks by the Acts were to constitute one estate under one management. Certain rates were charged to the vessels entering any one of the docks; and a vessel, having paid for entering one of the docks, could use any of the docks of the same class on either side of the river, or of a higher class by paying the difference. The docks on the Liverpool side were much more frequented than the docks on the Birkenhead side:—

Held, that, in rating to the poor-rate the docks on the Liverpool side, they were not to be treated as one system of docks with those on the Birkenhead side; but the earnings and outgoings of each set of docks must be kept distinct, and the Liverpool docks rated according to the net earnings on that side.

Reg. v. Hull Dock Co. (18 Q.B. 325; 21 L. J. (M.C.) 153), distinguished.

CASE stated on appeal under 12 & 13 Vict. c. 45, s. 11.

By a poor-rate of the parish of Liverpool, made on the 27th day of May, 1865, the appellants were assessed in the sum of 214,944*l.* in respect of the annual value of certain of the dock estates within the said parish which are vested in them; each dock, warehouse, shed, &c., being separately assessed.

1. The appellants are a corporation, incorporated and regulated by “The Mersey Docks and Harbour Act, 1857,” and “The Mersey Dock Acts Consolidation Act, 1858,” and under these Acts hold docks and other property used in connection with and for the purposes of the docks on both sides of the River Mersey.

2. The docks and other property are situate in several parishes and townships on the Lancashire and Cheshire sides of the Mersey. The part on the Lancashire side is situate in the parish of Liverpool and in the townships of Toxteth Park, Kirkdale, and Bootle. Each of the parishes and townships in which the docks and other property are situate, have separate rates for the relief of the poor.

3. The first dock on the Lancashire side of the Mersey was made under 8 Anne, c. 12, whereby the corporation of Liverpool were empowered to make a dock (since filled up) on the south side of the town of Liverpool, and the duties leviable under that

1872

MERSEY
DOCKS
v.
LIVERPOOL.

Act were not to be applied to any purposes except the building and repairing of the dock.

4. Other docks were subsequently made on the Lancashire side of the Mersey by the corporation of Liverpool, under the authority of other Acts of Parliament, similarly limiting the application of the receipts from the docks as was provided by 8 Anne, c. 12, until by 51 Geo. 3, c. 143, the corporation were formed into a body corporate, and the docks and works on the Lancashire side of the river were vested in them under the style of "The Trustees of the Liverpool Docks."

5. The trustees so incorporated were empowered by the last-mentioned Act to levy certain rates, and when all charges and mortgages upon such rates should be paid off they were required to lower and reduce the rates and duties thereby granted, as far as could be done in the state of the docks and works, so as to leave sufficient for all charges of management and collection of rates, and improving, repairing, and maintaining the docks and works.

6. Subsequently other Acts relating to the docks on the Lancashire side of the Mersey were passed, in all twenty-two in number, and forming a series extending from the 8 Anne to 21 Vict.

7. Other docks were formed on the Cheshire side of the Mersey, at Birkenhead, under the authority of a series of fourteen Acts extending from 7 & 8 Vict. to 18 & 19 Vict., by which last-mentioned Act, all the Birkenhead Docks were vested in the corporation of Liverpool.

8. By s. 26 of the Act of 1857 (20 & 21 Vict. c. clxii.), it is provided that all such estate and interest in the docks, buildings, and other property, both real and personal, situate at Birkenhead, or elsewhere, as were transferred or intended to be transferred to the corporation of Liverpool by "The Birkenhead Docks Act, 1855," should, upon the 1st of January, 1858, vest in the appellants, but subject to all charges and liabilities affecting the same.

9. By s. 27, it is provided that all such docks, lights, buoys, lands, buildings, and other property, both real and personal, situate at Liverpool or elsewhere, as were held by or in trust for the trustees of the Liverpool Docks, under or in pursuance, or for the purposes of any of the said Acts mentioned in the first part of the schedule thereto annexed, should upon and after the said 1st of

January, 1858, vest in the appellants, but subject to all charges and liabilities affecting the same.

10. By s. 49, it is enacted that subject to the provisions of that Act, the appellants should stand possessed of all the property, powers, rights, and privileges thereby transferred to them, upon the trusts and for the purposes upon and for which such property, powers, rights, and privileges were holden previously to the commencement of that Act.

11. By s. 50, after the 1st of January, 1858, all docks and works belonging to the board, and all docks and works that may hereafter belong to the board, shall be deemed to constitute one estate only, called "the Mersey Dock Estate," and a uniform system of management shall be adopted with respect to the whole of such estate.

12. The dock estates at present consist of basins, docks, piers, jetties, graving docks, gridirons, wharves, quays, landing-stages, slips, stairs, river-walls, drains, embankments, locks, gates, bridges, weirs, sluices, tunnels, cuts, channels, roads, railways, tramways, warehouses, sheds, offices, buildings, cranes, engines, machinery, and other works and conveniences, affixed or appertaining to such basins and docks, or necessary for the working thereof, and the appellants are authorized to receive large sums of money under the name of dock rates and duties, by virtue of the said Acts of Parliament, from the owners of vessels and goods, for the privilege of using the said dock property. The portion of such property within the parish of Liverpool is correctly set out in the assessment. The levying dock rates and harbour rates are regulated by ss. 230, 234, 238, and 239 of the Consolidation Act, 1858.

13. With slight exceptions the rates for using the dock property are uniform throughout. Any vessel having once paid the dock rate is entitled to use all docks where the rates are not larger, and to use any other docks on paying the difference. A similar principle applies to goods. With some exceptions the maximum rates are not charged.

14. The appellants are bound to apply the present dock rates and dues, and all other moneys received by them out of the dock estate, according to the directions of the said Acts. There are no shareholders, and no member of the board or other person derives

1872

MERSEY
DOCKS
v.
LIVERPOOL.

1872

MERSEY
DOCKS
v.

LIVERPOOL.

any personal advantage or emolument whatsoever from the execution of the trusts of the dock estate, or has any interest in the dock estate, or in the moneys received by the appellants.

15. All the property vested in the appellants was acquired, and all the docks, works, &c., were made and provided by them and their predecessors, under the several Acts of Parliament, solely for the purpose of the dock business, and none of the said property, docks, works, &c., are used for any other purposes whatsoever, and all moneys derived by the board from any part of the property is carried to the general dock estate, and is appropriated according to the provisions of the said Acts of Parliament.

16. The docks and dock property were erected and purchased by borrowed money, and the dock estate is now subject to a large debt in respect thereof, the annual interest on which is paid by the appellants out of their income. The ordinary repairs and renewals are paid out of such income so far as it suffices for the purpose.

17. The payment of this interest, and the application of the income, is provided for by s. 284 of the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), as follows:—

Subject to the provisions of the Mersey Docks and Harbour Act, 1857, all the moneys which shall be collected, levied, borrowed, and raised, or received by the board under or by virtue of this Act, or the said Act, the application of which may not be otherwise expressly directed, shall be applied by the board on any order with respect to priority of such application as they shall deem expedient for the following purposes, some or all of them, that is to say, in payment of all expenses and charges of collecting rates; in payment from time to time of all interest accruing due on moneys borrowed and to be borrowed, and in payment of the Mersey Docks annuities hereinafter authorized to be granted, according to the respective priorities of such moneys and annuities under this Act. In the construction of works authorized to be erected, established, and maintained by the board, and in supporting, maintaining, and repairing the same, and in carrying into execution all the provisions of this Act, and of the Mersey Docks and Harbour Act, 1857. And in the general management, conducting, securing, preserving, improving, amending, maintaining, and protecting the Mersey Dock Estate. And the residue or surplus of all such moneys which shall remain after such application thereof as aforesaid shall from time to time be applied in or towards the repayment of all principal moneys which shall have been borrowed by, or shall be due by the board, and in or towards the purchasing up and extinguishing of the Mersey Dock annuities in the manner hereinafter directed, until all such principal moneys shall have been repaid, and all Mersey Dock annuities shall have been purchased up and extinguished; and when by the means last-mentioned all such principal moneys shall have been repaid, and all such dock annuities shall have been purchased up and extinguished, then and in such case the board shall, and

they are hereby required, to lower and reduce the rates hereby authorized to be taken, so far as the same can be done in the then state of the docks, and leaving sufficient for the payment of the expenses of collecting the rates, and the supporting, maintaining, and repairing the docks, and the general management, conducting, securing, preserving, improving, amending, maintaining, and protecting the Mersey Dock Estate. And except as aforesaid such moneys shall not be applied by the board for any other purpose whatsoever.

1872

MERSEY
DOCKS
r.
LIVERPOOL.

18. A sinking fund, not exceeding 100,000*l.* in any one year, is provided for by s. 4 of the Mersey Docks and Harbour Act, 1859.

19. There has usually been an annual surplus available for the sinking fund, but it has never since 1861 amounted to 100,000*l.*

If the parochial principle of assessment were adopted in the parishes and townships in which the property of the appellants is situate on the Cheshire side of the Mersey, the rateable value of the property in those parishes or townships, would be very little as compared with that of the property of the appellants on the Lancashire side of the Mersey: inasmuch as under such system of calculation the undertaking on the Cheshire side is carried on at a loss if a proportional amount of the interest on the debt were charged against the earnings, and at an inconsiderable profit, even if such interest were not so charged. In fact, the rates received from persons who choose to make use of that part of the dock property which is within the parish of Liverpool, make up for and pay the losses sustained by the appellants in the parishes and townships on the Cheshire side of the river.

22. The gross estimated rentals mentioned in the assessments are arrived at by considering the docks and warehouses in the parish of Liverpool as separate property from the other parts of the dock estate, and as producing a certain amount of income without taking into account the nature of the whole undertaking, or the duties and liabilities of the appellants, and without taking into account the fact that parts of the undertaking in other parishes are carried on at a loss, or the facts mentioned in the last preceding paragraph of this case.

23. Accounts have been kept in respect of each particular dock on the following principles: Where the tonnage rate is payable on the inward voyage the whole of the rate has been credited to that dock in which the principal part of the cargo is discharged, and where the tonnage rate is payable on the outward voyage, the

1872

 MERSEY
 DOCKS
 v.
 LIVERPOOL.

whole sum is credited to that dock in which the principal part of the cargo is loaded.

As to the dock dues on goods the same rule prevails. The dues on the whole cargo are credited to that dock in which the principal portion of the cargo is loaded or discharged as the case may be.

This method of keeping the accounts has been adopted, because the accurate apportionment of the rates and dues has been hitherto unnecessary, and because of the difficulty of determining the proper principle of such apportionment.

24. There is no difficulty in estimating the necessary amount to be expended for the repairs and renewal of the dock estate, and in apportioning the general expenditure on the whole estate among the different docks according to the amount of income with which each is credited, and accounts have, in fact, been prepared on this basis. But considerable expenditure is incurred for the benefit of the whole dock estate, and the same difficulty of apportioning the expenditure exists as that referred to in the last preceding paragraph with reference to the income of the dock estate.

The appellants contest the correctness of the principle on which they have been rated by the respondents. The appellants contend, 1. That the proper method of assessment is to take the net income derived from the whole of the said property, and to divide the same amongst the different parishes or townships in proportion to their acreage, and that the result after making deductions is the proper rateable value. (1)

The respondents contend that in rating the appellants they are entitled to calculate the earnings of the docks within the parish, and after deducting the expenses of working those particular docks apart from the rest of the estate to calculate the rate on the sum so ascertained.

The Court were to draw all inferences which they might draw.

The question for the Court was, on what principle the dock property in the parish was to be rated. (2)

Manisty, Q.C. (with him *Crompton*), for the appellants, contended

(1) There were other contentions as to deductions, but the above point was the only one argued.

(2) There were other questions which were not argued by either side.

that on the authority of *Reg. v. Hull Dock Co.* (1), the docks on each side of the river must be treated as one system, and the net earnings of the whole ascertained, and the property of the appellants in each parish be rated in proportion to the acreage in each parish. He urged the difficulty of ascertaining the net earnings of the docks on each side of the river. If the dues were lowered, the docks on the Birkenhead side would soon be an actual loss, but the board were bound to keep them up from the receipts on the Liverpool side; the whole docks must therefore clearly be treated as one system and one concern.

Sir J. B. Karlake, Q.C. (*Littler* with him), for the respondents, was not heard.

COCKBURN, C.J. Our judgment must be in favour of the respondents. The *Hull Dock Case* (1) undoubtedly establishes this, that where there is a series of docks all lying contiguous to one another, and forming part of one entire concern, and toll is taken for the right to enter into and have the benefit of any of that series or general system of docks and dock accommodation, you cannot apply the parochial principle of rating, but you must have recourse to the acreage principle. But the language of all the judges in that case, I think, goes entirely to this, that you are not to resort to the acreage principle except *ex necessitate*, where you really cannot apply the other. If this case were on all fours with the *Hull Dock Case* (1), I do not know, as it has stood for eighteen years, that it would be right to overrule it, certainly not without further consideration. But this case appears to me to be plainly distinguishable, as the docks on the one side and the other of the Mersey do not appear to me to come within the designation of one series or system of docks. It is true that by the Act of Parliament these docks, which are essentially distinct and separate, are to be treated as one for the purpose of general management and for the financial operations connected with this property. But that does not appear to me to alter that which, in the very nature of things, is separate and distinct. Although for certain purposes they may be treated as one estate, in truth they are two estates, and the docks on the Cheshire side of the water can no more be said

1872

MERSEY
DOCKS
v.
LIVERPOOL.

(1) 18 Q. B. 325; 21 L. J. (M.C.) 153.

1872

MERSEY
DOCKS
v.
LIVERPOOL.

to be the same estate as the docks on the Liverpool side than two private estates, though under one management, can be said to be one estate. The people in Liverpool have a perfect right to the contribution to the local burthens of this property according to the value of the property on the Liverpool side. The docks extend, it appears, into more than one parish on the Liverpool side; and so far as the docks on the Liverpool side are concerned, the principle in the *Hull Dock Case* (1) may apply. But it seems to me that we are not in the present case called upon to resort to the acreage system, which is an objectionable one, and only to be resorted to in case of necessity. There is no occasion to apply it here. Although there might be some difficulty in detail, yet there is no insuperable difficulty in ascertaining what proportion of the earnings of these two docks is due to the docks on the one side of the river or due to the docks on the other side of the river. Therefore there is no necessity to have recourse to the acreage principle. But in such a case it would be eminently unjust if the people of Liverpool should lose the superior value of the property in Liverpool, and the people on the Cheshire side should obtain the benefit of the higher value on the other side, by the whole being thrown into one and so divided in equal proportions, instead of being treated according to the respective earnings on the one side or the other. As to what would be the proper principle to apply, if eventually the Cheshire Docks should prove to be a mere incumbrance and to be a source of no profit, and have to be maintained out of the earnings of the Liverpool Docks, is a very different question. I do not see any necessity, at present, for saying what would be the principle applicable to such a state of things if it should arrive. The rating must be according to the existing state of things, and not according to a future or speculative state of things. I think, therefore, the respondents are right, and our judgment must be for them.

BLACKBURN, J. I am of the same opinion. The Parochial Assessment Act (6 & 7 Wm. 4, c. 96) is express and imperative that the separate hereditaments are to be rated on the principle of the amount at which the same might be reasonably expected to le

(1) 18 Q. B. 325; 21 L. J. (M. C.) 153.

from year to year free from all rates and taxes, and deducting therefrom all the proper allowances in respect thereof. That principle is, in an immense majority of cases, very easily applicable. But where there comes what Sir William Erle used to call the complex problem, where there happens to be one undivided and indivisible property which produces a large rent and lies in different parishes, but as to which it is difficult to say how much profit comes from each portion in a particular parish, the application of the principle has long been found very difficult. The difficulties are found principally in the case of water companies and gas companies; but as to them there is a very practical rule of thumb now adopted which it would be undesirable to disturb, though it may not be very accurate.

Now, in the case of the *Hull Dock Co.* (1) the Court thought, and, as far as I know, rightly thought, that the Hull Docks were a system of docks opening one into another, and originally having one entrance into the Humber, at the mouth of the river, by which the ships came into these docks, lying in different parishes. There had been a new dock—the Victoria Dock—just made, which was, as I understand, at another opening into the river, but which opened into this system of docks, and what the Court thought in deciding the matter was, that the Victoria Dock and these other docks formed one indivisible dock, and as there was one payment made for entering into this one dock, although there were in fact several docks leading into each other, yet that there was no way of applying the parochial system except by saying, here is the one entire rent which a man will give for the whole dock, and each parish must have a portion of the earnings according to the acreage principle. But we must follow the parochial principle whenever it is possible. The docks on the Liverpool side lie in different townships. That may give rise hereafter to some question of rating, which however does not arise now. The docks on the Birkenhead side are two miles from the Liverpool side, quite separate and distinct docks, and there are a great many ships which enter the Liverpool side, and a much smaller number entering the Birkenhead side. Are we to say that there must be put on the Birkenhead property, for the purpose of rating in Birken-

1872

 MERSEY
DOCKS
v.
LIVERPOOL.

1872

MERSEY
DOCKS
v.
LIVERPOOL.

head, a value far beyond its true value, and the rateable value of the Liverpool Docks be diminished to half what they produce, because the two docks are united into one system, managed by one board, and receiving their common revenue for common purposes? I see no principle on which that is to be done. It may hereafter occur that, owing to the reduction in the rates, the docks at Birkenhead may be an actual loss, instead of being an actual profit, and when that occurs the question will have to be considered. I say nothing about it at the present moment; it will have to be determined whether the charge, in that case, of keeping up the Birkenhead Dock, will be one of those expenses which the Parochial Assessment Act says may be taken into account. I think there would be no practical difficulty in approximating sufficiently for all purposes of real justice, as Lord Campbell said in the case cited, though you cannot divide the revenue of the Mersey Board strictly in proportion to what is raised from the property in the parish of Liverpool, as distinguished from what is raised in the parish of Birkenhead. If you cannot get that with precise accuracy, you do perfect law and perfect justice if you approximate to it as near as you can, which can be done without much difficulty. That is the only question which we are now asked to decide. The respondents' principle seems to me to be the right one to apply; the manner in which it shall be worked out among the different parishes may give rise to other questions to be decided hereafter.

MELLOR, J. I am of the same opinion. If the facts assumed in the judgment of the judges in the *Hull Dock Case* (1) are such as they did assume, I think there can be very little doubt that the principle of acreage was properly applied, because of the impossibility of applying any other. But in the present case most people recollect the time when the Birkenhead Docks were an entirely distinct estate in Cheshire, and were rivals, it was supposed, to the Liverpool Docks, and for many years they so continued. There has been no physical change in those docks since; but by an Act of Parliament they have been formed into one estate under one board of management. I do not, however, see that that affects the application of the parochial principle, and I think the Birkenhead

(1) 18 Q. B. 325; 21 L. J. (M.C.) 153.

Docks ought still to be treated as separate and distinct, as regards their rateable value, from the Liverpool Docks. I agree, therefore, that our judgment must be in favour of the respondents.

1872

MERSEY
DOCKS
v.
LIVERPOOL.

LUSH, J. I am of the same opinion. The acreage principle is only to be applied when the parochial principle is impracticable. That is not the case here. I do not think the rateable value of the Birkenhead Docks is at all altered by the fact of their being united in interest and for the purpose of management with the Liverpool Docks. It is still quite practicable to ascertain how much the docks on the one side of the water actually earn, and how much the docks on the other actually earn. Therefore, there being no necessity for the application of the acreage principle, I think the parochial principle is the proper one.

Judgment for the respondents.

Attorneys for appellants : *Venn & Son, for Squarey, Liverpool.*

Attorney for respondents : *J. B. Batten.*

THE QUEEN v. THE JUSTICES OF MIDDLESEX.

May 30.

Poor-rate—Appeal governed by local Act, though valuation made under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67)—Effect of want of Notice of new Assessment under s. 9.

A metropolitan parish was regulated by a local Act, under which a rate for the relief of the poor and other parish purposes was to be made by the vestrymen, and any person aggrieved by the rate was to apply to the guardians for relief, and if dissatisfied with their decision, might then appeal to the quarter sessions, giving notice to the guardians. A valuation list for the parish was made by the overseers and finally settled by the assessment committee under 32 & 33 Vict. c. 67, in which certain property occupied by the appellants was newly assessed, but no notice was given to them by the overseers as required by s. 9. The appellants appealed direct to the quarter sessions, proceeding as in an appeal against a poor-rate under the general Act, 17 Geo. 2, c. 38 :—

Held, that the rate was still made under the local Act, though the valuation was to be in conformity with the valuation list under 32 & 33 Vict. c. 67; and that the proceedings not having been in conformity with the local Act the quarter sessions had no jurisdiction.

Quære, whether the valuation list was binding on the appellants, they not having had the notice required by s. 9 of 32 & 33 Vict. c. 67.

RULE calling on the Justices of Middlesex to shew cause why a writ of certiorari should not issue to bring up, for the purpose of

1872

THE QUEEN
v.
JUSTICES OF
MIDDLESEX.

quashing it, an order of quarter sessions made in an appeal, wherein the Houseless Poor Society were appellants and the overseers and other officers of the parish of St. Luke were respondents, touching a poor-rate of that parish made on the 24th of April, 1871.

The respondent parish is governed by a local Act, 48 Geo. 3, c. xcvii.; by s. 2 persons qualified in a certain way are made vestrymen, and by s. 15 the guardians are to be elected from this body; by s. 25 the vestrymen are to meet four times in a year, and are to "ascertain the sums necessary to be raised, by a just and equal pound rate, for the relief, maintenance, lodging, and employment of the poor of the parish, and for the payment of any interest or of any annuities chargeable on the rates of the parish, or for the repayment of any principal moneys which shall be due from the parish, and for the discharge of all other expenses of the parish, as to the vestrymen or the major part of them shall seem reasonable and sufficient to answer the purposes aforesaid and of this Act"; by s. 27 not less than fifteen of the vestrymen are to make and sign the rate or assessment which is to be made upon any person occupying any land, house, or other tenement, according to the general value thereof. By s. 29 the rates are to be allowed by two justices; and by s. 30 are then to be deemed valid. By s. 96 any person aggrieved "by any rate or assessment, &c., made in pursuance of this Act" shall apply for relief to the guardians at any meeting to be held within fourteen days next after the demand of the rate, and the guardians are empowered to give relief; and if the person is not satisfied with their determination he may appeal to the quarter sessions holden within seven weeks next after such determination, the appellant giving seven days' notice in writing of his intention to appeal to the clerk of the guardians and entering into certain recognizances; and the quarter sessions, upon proof of the notice and of the recognizances, shall hear and determine the appeal.

The election of vestrymen and guardians is modified by the Metropolis Local Management Act (18 & 19 Vict. c. 120).

In 1869 the parish became part of the metropolitan union of Holborn; and a valuation list, in accordance with 32 & 33 Vict. c. 67, was made by the overseers in May, 1870, and the list was finally approved by the assessment committee on the 7th of

January, 1871. In that list the property occupied by the appellants was assessed at 417*l.* rateable value. The list came into force on the 6th of April, 1871, and on the 25th of April the vestrymen of the parish made a poor-rate in accordance with the list, the sum assessed on the appellants being 22*l.* 11*s.* 9*d.*

1872

THE QUEEN
v.
JUSTICES OF
MIDDLESEX.

The rate was headed, "A rate or assessment of 13*d.* in the pound, made by the vestrymen, under 18 & 19 Vict. c. 120, pursuant to the provisions of the before recited Act (32 & 33 Vict. c. 67), and of 48 Geo. 3, c. xcvi., for the relief, maintenance, lodging, and employment of the poor of this parish, and for the payment of any interest or annuities chargeable on the rates of this parish, and for the discharge of all other expenses under the said Act, upon all and every person who shall inhabit or occupy any land, &c., or other premises or hereditaments within the said parish."

This rate was signed by sixteen vestrymen; but the declaration that it was in accordance with the valuation list was signed by the overseers; and the rate was duly allowed by justices.

The appellants appealed to the October quarter sessions, on the ground that they were overrated, and that no notice of the assessment of the appellants had been served, as required by s. 9 of 32 & 33 Vict. c. 67. (1) Objection was taken on behalf of the respondents, that the appellants had not complied with s. 96 of the Local Act. This the appellants admitted. The appeal was adjourned, under protest on the part of the respondents, to the January sessions, when the same objection was again taken by them, and counsel for the appellants contended that, as the declaration at the end of the rate was signed by the overseers, the sessions had jurisdiction to hear the appeal under s. 4 of 17 Geo. 2, c. 38, the Act which regulates appeals against poor-rates in general. Counsel for the respondents adhered to his objection, and declined to go into the merits; upon which, after hearing evidence for the appellants that the rating of the premises was too high, and that no notice of the new assessment, as this of the appellants was, had been served upon the appellants by the overseers, as required by s. 9 of 32 & 33 Vict. c. 67 (1),

(1) By 32 & 33 Vict. c. 67, s. 9, in the valuation list some hereditaments
When the overseers of the parish insert not previously assessed, or raise the gross

1872
THE QUEEN
v.
JUSTICES OF
MIDDLESEX.

the quarter sessions ordered the rate to be amended by striking out the rating of the appellants.

Metcalfe shewed cause on behalf of the appellants, and urged the same objections as were made at the sessions; and also the hardship on the appellants, who had had no notice of the assessment upon their property.

Huddleston, Q.C., shewed cause on behalf of the justices.

Poland, in support of the rule, was not heard.

BLACKBURN, J. The real grievance of the appellants seems to have been that their property was newly inserted in the valuation list, and the overseers neglected to give them notice as required by s. 9, and the consequence was that, although, as they maintain, they were overrated, the appellants lost their opportunity of going before the assessment committee in proper time in accordance with the Act of 1869. The valuation list is made conclusive as to the value of all hereditaments contained in it, and the rate must be made in accordance with it; whether or not the valuation is binding on persons who have had no notice under s. 9, we are not called upon to decide, and I express no opinion, though it would seem but just that it should not affect them. What we have to decide is whether the quarter sessions had jurisdiction under the circumstances to quash the appellants' assessment in this rate. The rate was made, as appears on the face of it, under the local Act; s. 25 of which enacts that the vestryman shall ascertain the sums of money "necessary to be raised by a just and equal pound rate," not only for the maintenance of the poor, but for other purposes, for the payment of interest "and for the discharge of all other expenses of the said parish." Since a valuation list has been made out under the Act of 1869, all rates made for the parish must be made in accordance with that list; but still the rate is made by

or rateable value of some hereditament above the value stated in the valuation list for the time being in force, or (where there is no valuation list) in the then last assessment to the poor-rate . . . the overseers shall, imme-

diately after the deposit or redeposit of the list (as the case may be) serve on the occupier of such hereditament a notice of the gross and rateable value thereof inserted in the valuation list."

the vestrymen under their local Act. The appellants contend that they have a right to appeal under the general Act, 17 Geo. 2, c. 38, s. 4; but the right of appeal there given is only against a rate made under the statute 43 Eliz. c. 2. Now that appeal is to be on notice to the churchwardens and overseers; but here the rate is made by the vestry, and to give notice to the churchwardens and overseers against a rate made by others would certainly be anomalous. But the appeal against the rate is really given by s. 96 of the local Act, and under that section the appellants ought first to have gone before the guardians, and then if dissatisfied their appeal is to the quarter sessions on notice to the clerk of the guardians. Unfortunately the appellants did not comply with these requirements, and therefore the quarter sessions had no jurisdiction to hear the appeal. The rule must therefore be absolute.

1872

THE QUEEN
v.
JUSTICES OF
MIDDLESEX.

MELLOR, J., concurred.

LUSH, J. The only question now before us is whether the quarter sessions had any jurisdiction to entertain the appeal under the general Act, 17 Geo. 2, c. 38. For the reasons already given, I am clearly of opinion they had not. The rate is not made under the Act of Elizabeth, which is the Act contemplated by 17 Geo. 2, c. 38, but under the local Act. The appeal therefore is under s. 96 of that Act: for although the valuation is regulated by the assessment list under 32 & 33 Vict. c. 67, the valuation is the only matter which is touched, and all other matters are left untouched. But even if s. 96 were repealed, that would not give jurisdiction to the quarter sessions, for the appeal by 32 & 33 Vict. c. 67 is given, not to the quarter sessions, but to the assessment sessions. Therefore the quarter sessions had no jurisdiction, inasmuch as the conditions precedent had not been performed.

Rule absolute.

Attorneys for appellants: *Hallowes, Price, & Hallowes.*

Attorneys for justices: *Allen & Son.*

Attorney for respondents: *W. W. Hayne.*

1872

June 3.

EX PARTE MICHAEL.

*Admiralty Jurisdiction—Cause for Necessaries under 24 Vict. c. 10, s. 5—
Owner domiciled in England—Prohibition.*

By 24 Vict. c. 10, s. 5, "the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales . . ."

By 31 & 32 Vict. c. 71, s. 3, subs. 2: Any county court having admiralty jurisdiction has jurisdiction as to necessaries up to 150*l*.

A ship being in the port of B., which was not the port to which she belonged, a suit was instituted in the county court for necessaries supplied to her at B., and the ship was arrested the same day, and judgment was given for the amount claimed. Afterwards the owner, who was abroad, but was a British subject domiciled in England, applied to the judge of the county court to stay proceedings, and was refused. A motion was then made for a prohibition:—

Held, that, in order to deprive the Admiralty Court of the jurisdiction given to it, it must be shewn to the Court before the Court pronounced judgment that the owner was domiciled in England.

MOTION for a rule for a prohibition to the County Court of Gloucestershire holden at Bristol.

By 24 Vict. c. 10, s. 5, "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales . . ."

By 31 & 32 Vict. c. 71, s. 3, "Any county court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes . . . (2): As to any claim for towage, necessaries, or wages—any cause in which the amount claimed does not exceed 150*l*."

The bark *Lothair* being in the port of Bristol, which was not the port to which she belonged, a suit was instituted in the county court in January, 1872, by one Hubbard for necessaries supplied to her at Bristol, to an amount under 25*l*, and the bark was arrested on the same day. Judgment was given in March for the

plaintiff for the amount claimed. Michael, the owner of the bark, who is a British subject domiciled in England, was abroad at the time; but on his return, after judgment had been given, he applied on the 15th of May to the county court judge to stay proceedings, but the judge refused any relief.

The present motion was made on affidavits of the above facts.

R. E. Webster, in support of the motion. The ground of the motion for a prohibition is, that the county court had no jurisdiction on its being shewn that the owner of the ship was domiciled in England. It has been decided that the jurisdiction of the county court in admiralty causes is only co-extensive with the jurisdiction of the High Court of Admiralty. (1) Consequently the jurisdiction *primâ facie* given to the county court in a claim for necessities is ousted as soon as it is shewn that the owner is domiciled in England. It is true that judgment has been pronounced, but prohibition will lie notwithstanding that, as long as there are any proceedings to be taken in the inferior court. (2)

[BLACKBURN, J. The domicile of the defendant was not shewn before the judgment had been given.

LUSH, J. If the judge had jurisdiction to pronounce judgment this Court cannot interfere, and *ex concessis* he had jurisdiction, unless it was shewn, which it was not, that the owner had an English domicile.]

The statute fixes no time for shewing this; and surely it is sufficient if it is shewn before the ship is sold.

COCKBURN, C.J. I am of opinion that there should be no rule. The case is not one in which a writ of prohibition can be properly applied. It is conceded that the county court had jurisdiction over the subject-matter of the suit, and the only ground on which the court could be called upon to proceed no further is the exception in the section which gives the jurisdiction, that it be shewn to the satisfaction of the court, that is, the court in which the suit is pending, that the defendant is domiciled in England or Wales but clearly that must be before the court has exercised its juris-

1872

EX PARTE
MICHAEL.

(1) See *The Douse*, Law Rep. 3 A. Rep. 5 C. P. 428.
& E. 135; *Everard v. Kendall*, Law

(2) See Com. Dig. Prohibition (D).

1872

EX PARTE
MICHAEL.

diction and pronounced judgment. After that, there may be ground for appealing to the judge of the county court as to whether the proceedings should be carried further against the ship; I say nothing as to that; but it is too late to apply to this Court for a prohibition. The judge of the county court had jurisdiction over the subject-matter and to pronounce judgment unless a certain plea to the jurisdiction were set up, and that plea was not set up. It is urged that the defendant was absent, and the captain was inops concilii, but he might have consulted an attorney and ascertained the position of his owner without difficulty. I may add that an additional reason why the objection must be raised before judgment is, that the domicile of the owner might be a disputed fact, which the judge would have to decide while both parties were before him.

BLACKBURN, J. I am of the same opinion. The rule of the common law was that the Court of Admiralty had no jurisdiction over a cause for necessities supplied to a ship at home; that belonged to the courts of common law. Then it was enacted that the Court of Admiralty should have jurisdiction over a claim for necessities supplied to any ship elsewhere than at the port to which the ship belongs. That seems clearly enough to enact that the Admiralty Court shall have jurisdiction when the necessities are supplied in England, just as if they had been supplied abroad; but then it is added, unless it be shewn to the Court that the owner be domiciled in England; but that must be alleged and proved to the satisfaction of the Court before judgment; and it is too late afterwards.

MELLOR and LUSH, JJ., concurred.

Rule refused.

Attorneys for applicant: *Ingledeu, Ince, & Greening.*

ROSS *v.* FEDDEN AND ANOTHER.

1872

June 6.

Adjoining Occupiers—Non-liability of Occupier of upper Floor of House to Occupier of lower Floor for Escape of Water.

The plaintiff occupied for business purposes the ground floor and the defendants the second floor of the same house, respectively, as tenants from year to year. There was a water-closet on the defendants' premises to and of which they alone had access and use. After their respective premises had been closed on a Saturday evening, water percolated from the water-closet through the first floor to the plaintiff's premises and caused damage to his stock in trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order and failed to close, and the waste pipe being choked with paper. The defects could not be detected without examination, and the defendants did not know of them, and were guilty of no negligence:—

Held, that there was no obligation on the defendants to keep in the water at their peril; and that they were not liable to the plaintiff for the damage.

CASE on appeal from the County Court of Northumberland holden at Newcastle.

The plaint was tried before the deputy judge without a jury, and he took time to consider. The following was the written judgment delivered by him. (1)

The plaintiff is tenant from year to year of the ground floor of No. 2, Queen Street, Newcastle, where he carries on business as an ironmonger. The defendants are tenants from year to year of the second floor of the same house, which they occupy as offices. Some time between the evening of Saturday, the 26th of November, and the morning of Monday, the 28th of November, 1870, water escaped from a water-closet in the defendants' premises, found its way down through the first floor to the ground floor and there did damage to the plaintiff's premises and goods to the extent of 79*l.* 5*s.* 3*d.* This damage the plaintiff seeks to recover from the defendants in the present action.

The plaintiff's claim to recover is put upon two grounds. First, it is said that the mischief arose from the negligence of the

(1) The judgment was not made part of the case, but there being doubts as to the meaning of parts of the case (which had been settled without reference to the deputy judge), *Bruce* read

the judgment as part of the case; and as the facts are fully stated in the judgment, it is unnecessary to repeat them.

1 QBD 24
XPD 241
246
6 QBD 31

1872

ROSS
v.
FEDDEN.

defendants. Now upon this matter the evidence is very slight, and there is no inconsistency in it. The closet was inside the defendants' private office, and no one had access to it but the two partners in the defendants' firm, and it was for their exclusive use. One of the partners was from home at the time of the occurrence. The other partner, who was called as a witness, stated that the closet had previously to the Saturday been in good order, that he believed he had used it on the Saturday morning and found nothing amiss, and no one could have used it afterwards; that on the Saturday evening at about 6 or 6.30 he washed his hands at the wash-hand stand in the same room with the closet, and nothing then appeared to be the matter with it. He then left the office, and no one appears to have entered it again till Monday morning.

On the Monday morning, when the plaintiff came to his shop, he found the damage done of which he now complains. Together with a plumber, whom he had sent for, he traced the escape of water upwards to the second floor. They obtained access to the defendants' offices and the closet inside, and found that the water had overflowed the pan. On examination it appeared the cause of this was that the valve admitting the supply of water to the pan had given way and failed to close, and the overflow pipe had become stuffed with paper. The valve, the defect in which was the real cause of the mischief, was under the seat of the closet, and could only be reached or seen by removing the woodwork.

Upon this evidence I think the defendants are not shewn to have been guilty of any negligence. Up to Saturday evening there was no reason to suspect that the valve had given way, or was in any danger of giving way, or that anything was wrong with the closet, and I see no negligence in not guarding against a danger which there is no reason to anticipate. Upon the first question, therefore, which is one of fact, my opinion is in favour of the defendants.

But it has been argued, secondly, on behalf of the plaintiff, that he is entitled to recover, even in the absence of any negligence on the part of the defendants, upon the authority of *Rylands v. Fletcher* (1) and other cases similar in principle. In that case it was decided that, as between adjoining owners, one who diverted water from its

(1) Law Rep. 3 H. L. 330.

natural flow, and accumulated it on his own land for his own purposes, is bound at all hazards to prevent its escape, and if it does escape, negligence or no negligence, he is responsible to his neighbour for the consequences. It is contended that the same rule applies to this case. On the other hand, the case of *Carstairs v. Taylor* (1) has been cited. In that case the plaintiff was the occupier of the ground floor of a warehouse, and the defendant of the upper part. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A rat made a hole in the box, the water escaped and injured the plaintiff's goods in his warehouse below; and it was held that the defendant was not liable for this damage. That case is not, I think, at all a direct authority for the decision of the present; it differs in two important particulars. The apparatus for conducting the water was there as much for the benefit of the plaintiff as of the defendant, a fact upon which much stress is laid in the judgment of Bramwell, B.; whilst here the water-closet was solely for the defendants' benefit; and further, in that case, the circumstances that caused the damage was one falling under the head of *vis major*, a fact to which much weight is given by the Lord Chief Baron and Martin, B. This cannot be said in the present case. I think, however, that the judgment in *Carstairs v. Taylor* (1) leaves it very doubtful whether the rule of law, laid down in *Rylands v. Fletcher* (2) in the case of adjacent owners, applies to the case of two persons occupying two floors of the same house. But assuming the rule to apply, is the present case within it? As between the occupiers of parts of a house—a thing wholly artificial—it is rather a straining of language to speak of any one state of things as more natural than another. But I think that in the words of Martin, B., in the case already referred to, “one who takes a floor of a house must be held to take the premises as they are.” As far as he is concerned, I think the state of things then existing may be treated as the natural state of things, and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water; I think he takes subject to the ordinary risks arising from the use of the rest of the house as it stands; and that one who merely continues to use the rest of the house as it stands and in the ordi-

1872

 ROSS
v.
FEDDEN.

(1) Law Rep. 6 Ex. 217.

(2) Law Rep. 3 H. L. 330.

1872
 ROSS
 v.
 FEDDEN.

nary manner does not fall within the rule laid down in *Rylands v. Fletcher* (1), and in the absence of negligence, is not liable for the consequences; and in the present case there is nothing to shew, nor has it been suggested, that the water-closet or anything connected with it has been in any way altered by the defendants since they came into occupation. There is nothing to shew, nor has it been suggested, that it has been in any way altered since the plaintiff became tenant of the ground floor, or that it has been used in any but the ordinary manner. The question is one of some difficulty, but my opinion is that under the circumstances of the case, in the absence of negligence on the part of the defendants, they are not liable for the damage which the plaintiff has sustained.

The questions for the opinion of the Court were: 1st, Was not the judge wrong in ruling that there was no evidence of negligence on the part of the defendants? 2nd, If negligence was proved, ought not the judgment of the Court to have been for the plaintiff? 3rd, Even in the absence of negligence, was it not the duty of the defendants so to use their premises that they should not injure those of the plaintiff, and therefore should not the judgment have been for the plaintiff? Lastly, Whether or not on the whole case the judgment of the learned judge was not wrong in point of law.

G. Bruce, for the plaintiff. The principle of *Rylands v. Fletcher* (1) applies to this case. The plaintiff and defendants are in the relative position of adjoining occupiers; and if one for his own use has accumulated water upon his premises, he must keep it in at his peril. In *Carstairs v. Taylor* (2) the water was only that which accumulated from natural causes, viz., the rain. The present is the converse of *Humphries v. Brogden*. (3) Just as in that case the occupier of the under ground was held bound to leave support for the surface, so here the occupier of the upper floor is under an obligation to see that the landlord's water-pipe is in good order (for the landlord cannot do so), or to recoup the landlord or his tenants for the consequences.

(1) Law Rep. 3 H. L. 330.

(2) Law Rep. 6 Ex. 217.

(3) 12 Q. B. 739; 20 L. J. (Q.B.) 10.

[BLACKBURN, J. The cases are not analogous. Suppose the under walls, not obviously in a dilapidated or dangerous state, fall, according to the argument for the plaintiff, the upper man would have a right of action against the under man for not keeping up the upper walls.]

C. Hall, for the defendants, referred to the note to *Pomfret v. Ricroft* (1), and *Chauntler v. Robinson* (2), and was then stopped by the Court.

BLACKBURN, J. It was very proper on the part of Mr. Bruce to read the judgment of the deputy county court judge; the judgment is very well argued out, and I was prepared to agree with it as soon as I heard it read. I think it is impossible to say that defendants as occupiers of the upper story of a house were liable to the plaintiff under the circumstances found in the case. The water-closet and the supply pipe are for their convenience and use, but I cannot think there is any obligation on them at all hazards to keep the pipe from bursting or otherwise getting out of order. The cause of the overflow was the valve of the supply pipe getting out of order and the escape pipe being choked with paper, and the judge has expressly found that there was no negligence; and the only ground taken by the plaintiff is, that, the plaintiff and defendants being occupiers under the same landlord, the defendants, being the occupiers of the upper story, contracted an obligation binding them in favour of the plaintiff, the occupier of the lower story, to keep the water in at their peril. I do not agree to that; I do not think the maxim "*Sic utere tuo ut alienum non lædas*" applies. Negligence is negatived; and probably, if the defendants had got notice of the state of the valve and pipe and had done nothing, there might have been ground for the argument that they were liable for the consequences; but I do not think the law casts on the defendants any such obligation as the plaintiff contends for. The judgment must, therefore, be affirmed.

MELLOR, J. I am of the same opinion. I was prepared to listen to any authority in favour of the plaintiff, but none has been found. In the absence of negligence there is nothing in the

(1) 1 Wms. Saund. at p. 121, n. (1).

(2) 4 Ex. 163.

1872
ROSS
v.
FEDDEN.

relative position of the parties which would make the defendants liable. The statement in the case rendered the ground of the judge's decision doubtful, but this was cleared up when the judgment was read. I was very glad that this was done. I am quite satisfied with the reasoning in it. *Rylands v. Fletcher* (1) does not apply; and *Carstairs v. Taylor* (2) is a much stronger case than the present, as it seems to me, in favour of the defendants.

LUSH, J. I am of the same opinion. I go along with the judgment of the learned deputy judge, which I think sound and well reasoned.

Judgment for the defendants.

Attorneys for plaintiff: *Pattison, Wigg, & Co., for G. Armstrong, Newcastle.*

Attorneys for defendants: *Kynaston & Gasquett.*

July 6.

PHILLIPS v. FOXALL.

Guarantee—Concealment of Dishonesty of Servant—Discharge of Surety.

On a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

Declaration on a contract whereby the defendant guaranteed the honesty of one J. S., a servant in the employ of the plaintiff, to the extent of 50*l.* The declaration set out the employment of J. S., and that it was his duty to collect money for the plaintiff and account to her for all sums of money so collected; and that the plaintiff had, before the giving of the guarantee, held in her hands a sum of money belonging to J. S. as a security for the proper performance by J. S. of his duty, which sum the plaintiff had agreed to pay back to J. S. on receiving the defendant's guarantee. The declaration then alleged that in consideration that the plaintiff would pay over to J. S. the money so held and continue him in the service of the plaintiff, in the same capacity as before, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss not exceeding 50*l.* which she might at any time sustain through any breach of his duty by J. S. during the continuance of such service. Breach, that J. S. failed to pay over money to the amount of 50*l.* which he had collected. In answer to this declaration the defendant divided the time during which the service lasted, and during which the

(1) Law Rep. 3 H. L. 330.

(2) Law Rep. 6 Ex. 217.

loss was sustained into two periods : first, from the 8th of June, 1869, when the contract was made, to the 20th of November, 1869 ; secondly, from the last mentioned day to the 6th of April, 1871, when the service terminated. As to the first, the defendant admitted his liability. As to the other he pleaded, on equitable grounds, that J. S. had been guilty of defalcations in the course of his service between the 8th of June and the 20th of November, 1869, which the plaintiff discovered on the latter day, and that the plaintiff, without communicating such discovery to the defendant, and while the defendant was ignorant of J. S.'s dishonesty, agreed with J. S. to continue him in her employ as before, and J. S. agreed to pay to the plaintiff 3*l.* a month on account of the previous defalcations ; that J. S. was continued in plaintiff's service accordingly on those terms ; and that the loss in respect of which the plea is pleaded was occasioned by acts of dishonesty committed by J. S. during the continuance of the service after the 20th of November, and between that time and the termination of the service, the defendant during that time being wholly ignorant of the previous defalcations of J. S. ; and that by reason of the plaintiff not giving the defendant notice of such defalcations he was prevented from revoking the guarantee :—

Held, on demurrer, that the plea was a good answer to the declaration.

By Cockburn, C.J., Lush and Quain, JJ., on the ground that, as the obligation of the surety is continuing, the obligation of the creditor also continues ; and that the representation and understanding, as to the trustworthiness of the servant, on which the contract was originally founded, continue until its termination.

By Blackburn J., that the surety was discharged, because by continuing J. S. in her service, after knowledge of the misconduct, the plaintiff had deprived herself of the right of terminating the service, a right which the surety was entitled in equity to have exercised for his protection.

Burgess v. Eve (Law Rep. 13 Eq. 450) approved.

DECLARATION that one J. Smith was in the service and employment of the plaintiff in the way of her trade and business as a tea merchant, in the capacity of a van man, and that it was the duty of J. Smith, in the course of such service and employment, and in that capacity, to receive and collect sums of money from the customers of and for and on account of the plaintiff, and to pay over such moneys, when so received and collected, to the plaintiff ; and that the plaintiff then had and held for and on account of J. Smith and as a security to the plaintiff, with the assent of J. Smith, for the due and faithful performance by him of his duties as such van man, a large sum of money of and belonging to J. Smith, and that J. Smith requested the plaintiff to give up the security, and to pay over to him the money of his so then held by the plaintiff, and to continue him in her service and employ in the capacity aforesaid after and notwithstanding that the money had been so

1872

 PHILLIPS
v.
FOXALL.

1872
PHILLIPS
v.
FOXALL.

paid over to him, which the plaintiff consented to do upon the defendant in lieu of the security guaranteeing and promising to be answerable to the plaintiff for any loss, not exceeding the sum of 50*l.* in all; which she might from time to time or at any time thereafter sustain through any breach of such duty as aforesaid on the part of J. Smith in and during the course and continuance of his service and employment by the plaintiff in such capacity as aforesaid; and thereupon, in consideration that the plaintiff would relinquish and give up the security by paying over to J. Smith the money of his so then held by the plaintiff, and would continue J. Smith in her service and employ in the capacity aforesaid after and notwithstanding the relinquishment of the security, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss not exceeding the sum of 50*l.* in all, which she might from time to time or at any time thereafter sustain through any breach of such duty on the part of J. Smith in and during the course and continuance of his service and employment by the plaintiff; and that the plaintiff, relying upon the promise of the defendant, afterwards, and under and in pursuance of the agreement, paid over to J. Smith the money of his so then held by her, the plaintiff; and that after the making of the agreement she, the plaintiff, sustained loss to an amount exceeding the sum of 50*l.* through divers breaches of duty on the part of J. Smith in and during the course and continuance of the service and employment by the plaintiff, by reason of his having failed to pay over to the plaintiff certain moneys received and collected by him in the course of and during the continuance of the service and employment from certain customers of the plaintiff for and on her account; that all conditions precedent had been fulfilled, yet neither J. Smith nor the defendant had ever made good or repaid to the plaintiff the loss to the extent of 50*l.* so sustained by her.

Pleas, 1. As to so much of the plaintiff's claim as arises in respect of moneys received and collected by J. Smith in the course and during the continuance of the service from certain customers after the making of the agreement on the 8th of June, 1869, and prior to the 20th day of November, 1869, payment into court of 10*l.*

2. As to the residue of the plaintiff's claim, upon equitable grounds, that after the making of the agreement on the 8th of

June, 1869, and prior to the 20th of November, 1869, J. Smith received and collected in the course and during the continuance of his service and employment divers sums of money from customers of the plaintiff for and on her account, which sums of money so received and collected it was the duty of J. Smith to pay over to the plaintiff; and J. Smith, in violation of the duty, failed to pay over to the plaintiff large sums of the moneys so collected and received, and embezzled the same; and the plaintiff sustained a loss by the breaches of the duty by J. Smith, to wit, the amount of 57*l.*, all of which breaches of duty were to the extent of 50*l.* covered and secured by the agreement of the defendant, and to make good which, to the extent of 50*l.*, the defendant was under the agreement liable. That the plaintiff discovered and became aware of the breaches of duty and embezzlements by J. Smith on or about the 20th of November, 1869; and the plaintiff, without communicating to the defendant, or informing him of the breaches of duty, defalcations, and embezzlements of J. Smith, or any or either of them, agreed with J. Smith that he should continue in the service and in the performance of the duty of collecting and receiving moneys for and on behalf of the plaintiff, and should pay to the plaintiff a sum of 3*l.* per month in liquidation of the sum of 57*l.* then due and owing by J. Smith in respect of the defalcations and breaches of duty and embezzlements; and thereupon the service of the plaintiff and the performance of the duty of receiving and collecting moneys for and on behalf of the plaintiff until the 4th of April, 1871, was continued; and during the service so continued from the 20th of November, 1869, J. Smith paid large sums of money to the plaintiff in reduction and discharge of the defalcations, breaches of duty, and embezzlements, to wit, 48*l.*; and after the discovery of the defalcations and embezzlements, and after the arrangement for liquidation by J. Smith, and during the continuance of J. Smith in the service and in the discharge of the duty of receiving and collecting moneys for and on behalf of the plaintiff, J. Smith received and collected the moneys for and on account of the plaintiff comprised in the residue of the plaintiff's claim in the declaration mentioned herein pleaded to; that during the whole of the time in which J. Smith received and collected

1872

PHILLIPS
v.
FOXALL.

1872
 PHILLIPS
 v
 FOXALL.

the sums of money in manner aforesaid, the defendant was wholly ignorant of the defalcations and embezzlements and breaches of duty prior to the 20th of November, 1869; and that by reason of the non-disclosure to the defendant by the plaintiff of the default and embezzlement the defendant was prevented from immediately revoking the guarantee, and from at once compelling J. Smith to pay the defendant the moneys he was liable under the agreement to pay the plaintiff. And that the plaintiff continued J. Smith in the service and in the performance of the duty after the discovery of the first-mentioned defalcations and embezzlements without communicating the same to the defendant, contrary to good faith and the true intent and meaning of the agreement.

Demurrer and joinder in demurrer.

April 23. *F. M. White*, in support of the demurrer.

Willis, contra.

The arguments sufficiently appear from the judgments.

In addition to the cases mentioned in the judgments, the following were cited: *Black v. Ottoman Bank* (1); *Gordon v. Calvert* (2); *Frank v. Edwards* (3); *Pybus v. Gibb* (4); *North Western Ry. Co. v. Whinray* (5); *Offord v. Davies* (6); *Skillett v. Fletcher*. (7)

Cur. adv. vult.

July 6. The judgment of Cockburn, C.J., Lush, and Quain, JJ., was delivered by

QUAIN, J. This is an action brought by the plaintiff on a contract whereby the defendant guaranteed the honesty of one John Smith, a servant in the employ of the plaintiff, to the extent of 50*l*. The contract is set out in the declaration, and recites the employment of Smith, and that it was his duty to collect money for the plaintiff, and account to her for all sums of money so collected, and that the plaintiff had before the giving of the guarantee held in her hands a sum of money belonging to Smith as a security

(1) 15 Moo. P. C. 472.

(2) 2 Sim, 253.

(3) 8 Ex. 214; 22 L. J. (Ex.) 42.

(4) 6 E. & B. 902; 26 L. J. (Q.B.) 41.

(5) 10 Ex. 77; 23 L. J. (Ex.) 261.

(6) 12 C. B. (N.S.) 748; 31 L. J. (C.P.) 319.

(7) Law Rep. 2 C. P. 469.

3 ju 25. 215.

for the proper performance by Smith of his duty, which sum the plaintiff had agreed to pay back to Smith on receiving the defendant's guarantee. The declaration then proceeds to allege that in consideration that the plaintiff would pay over to Smith the money so held, and continue him in the service of the plaintiff in the same capacity as before, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss, not exceeding 50*l.*, which she might at any time sustain through any breach by Smith of his duty during the continuance of such service; and it alleges a breach, in the usual form, that Smith failed to pay over sums of money to the amount of 50*l.* which he had collected on behalf of the plaintiff.

In answer to this declaration the defendant divides the time during which the service lasted, and during which the loss was sustained, into *two* periods: first, from the 8th of June, 1869, when the contract was made, to the 20th of November, 1869; and, secondly, from the last-mentioned day to the 4th day of April, 1871, when the service terminated. As to the first period the defendant admits his liability for loss incurred by the acts of the servant during that period, and he has paid 10*l.* into court, which he alleges is sufficient to reimburse the plaintiff for such loss. As to the second period he pleads a plea on equitable grounds, which is to this effect:—that the servant had been guilty of defalcations in the course of his service between the 8th of June and the 20th of November, 1869, which the plaintiff had discovered on the latter day, and that the plaintiff then, without communicating such discovery to the defendant, and while the defendant was ignorant of the servant's dishonesty, agreed with the servant to continue him in her employ as before, and the servant on the other hand agreed to pay to the plaintiff 3*l.* a month on account of the previous defalcations. The plea then alleges that the servant was continued in the plaintiff's service accordingly on those terms. The plea then goes on to state, that the loss in respect of which the plea is pleaded was occasioned by acts of dishonesty committed by the servant during the continuance of the service, as so agreed on, after the 20th of November, and between that time and the termination of the service, the defendant during that time being wholly ignorant of the previous defalcations of the servant;

1872

PHILLIPS
v.
FOXALL.

1872
PHILLIPS
v.
FOXALL.

and that by reason of the plaintiff not having given the defendant notice of such defalcations he was prevented from revoking the guarantee.

To this plea the plaintiff has demurred, and the question argued before us was whether the plea afforded a good defence to so much of the cause of action as it was pleaded to, namely, the loss occasioned by the defalcations of the servant committed between the 20th of November and the end of the service.

We are of opinion that the plea is good.

We think that in a case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

Suppose that the state of facts, which has arisen here in the course of the service, had existed before or at the time when the guarantee was given, in other words, that the servant had previously committed defalcations in the plaintiff's service, and had agreed to repay them at the rate of 3*l.* a month, and that this fact had been concealed by the master from the defendant when he gave the guarantee, it cannot, we think, be doubted that a fraud would have been committed on the surety which would have relieved him from all liability on the contract. This we think is established by the judgments of the House of Lords in *Smith v. Bank of Scotland* (1), and in *Railton v. Mathews*. (2) In the former case Lord Eldon says, "If a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he was not so, then it was agreeable to the doctrines of equity, at least in England,

(1) 1 Dow, 272, 292.

(2) 10 Cl. & F. 934, 943.

that no one should be permitted to take advantage of such conduct even with a view to security against future transactions of the agent." In the latter case Lord Cottenham cites with approbation the opinion of Lord Eldon in *Smith v. Bank of Scotland* (1), and Lord Campbell adds, "If the defenders had facts within their knowledge which it was material the sureties should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts—the undue concealment of those facts—discharges the surety."

We do not think that the principles of law as laid down in these cases have been materially altered by the decision of the House of Lords in the subsequent case of *Hamilton v. Watson* (2), or by that of the Court of Exchequer in the *North British Insurance Co. v. Lloyd*. (3) In the former case the principle above mentioned was not denied, but the question that arose was as to its application to the facts of that particular case, and Lord Campbell states that the criterion for the necessity of voluntarily disclosing any particular fact in cases of this kind may be, whether the fact not communicated was one that could "not naturally be expected to have taken place between the parties who are concerned in the transaction." In *North British Insurance Co. v. Lloyd* (3), the Court of Exchequer held that the rule, as to the effect of concealment in marine insurance cases, did not apply to contracts of suretyship, and that in the latter cases the concealment must be fraudulent in order to avoid the contract. In *Lee v. Jones* (4), the majority of the judges in the Exchequer Chamber held that a concealment by the creditor—that at the time of the contract the principal debtor was already indebted to the creditor in a considerable amount, of which the surety was ignorant—was evidence to go to the jury of such a fraud on the surety as would discharge him from liability. It must depend (as observed by Blackburn, J., in the case last cited) "upon the nature of the transaction in every case, whether the fact not disclosed is such that it is impliedly represented not to exist." We cannot doubt but that previous acts of dishonesty by the servant in the same service, known to the master, would be such a fact, and if concealed from the surety

1872

 PHILLIPS
v.
FOXALL.

(1) 1 Dow, 272.

(2) 12 Cl. & F. 109.

(3) 10 Ex. 523; 24 L. J. (Ex.) 14.

(4) 17 C. B. (N.S.) 482, 506; 34 L. J. (C.P.) 131.

Ames 45
11/11/81

1872

PHILLIPS

v.

FOXALL.

would avoid the contract: vide Story's Equity Jurisprudence, vol. i., ss. 215 and 324.

If, therefore, it is correct, as we think it is, on these authorities, to say that such a concealment as is here pleaded, if it had been practised at the time when the contract was first entered into, would have discharged the surety, we think that in the case of a continuing guarantee a similar concealment made during the progress of the contract ought to have a similar effect as regards the future liability of the surety, unless his assent has been obtained, after knowledge of the dishonesty, that his guarantee should hold good during the subsequent service. One of the reasons usually given for holding that such a concealment as we are here considering would discharge the surety from his obligations, is, that it is only reasonable to suppose that such a fact if known to him must necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner it seems to us equally reasonable to suppose that it never could have entered into the contemplation of the parties that, after the servant's dishonesty in the service had been discovered, the guarantee should continue to apply to his future conduct, when the master chose for his own purposes to continue the servant in his employ without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination.

If the guarantee at its inception was founded, as suggested, by Lord Eldon in *Smith v. Bank of Scotland* (1), on the trustworthiness of the servant, so far as that was known to both parties, as soon as his dishonesty is discovered and becomes known to the master, the whole foundation for the continuance of the contract as regards the surety fails; and it seems to us in accordance with the plainest principles of equity and fair dealing, that the master should, on making such discovery, either dismiss the servant, or, if he chooses to continue him in his employ without the knowledge or assent of the surety, that he must himself stand the risk of loss

(1) 1 Dow, 272, 292.

arising from any future dishonesty. "It is the clearest and most evident equity" (says Lord Loughborough, in *Rees v. Berrington* (1)) "not to carry on any transaction without the knowledge of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own), without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." Thus in the present case, the conduct of the master in retaining the servant in his employ, when he might have discharged him for dishonesty, seems, in the words of Lord Loughborough, an indulgence granted to the servant without the assent of the surety, and contrary to the nature of his engagement. The time at which the surety will be discharged from further liability in cases of this kind will vary according to the circumstances of each case; but we intend our judgment to apply only to cases like the one now before the Court, where the master, having the power of at once discharging the servant for dishonesty, deliberately continues him in his service, after he becomes aware of the dishonesty and without the assent or knowledge of the surety.

1872

 PHILLIPS
v.
FOXALL

No case directly in point, either in favour of this plea or against it, has been cited before us. In *Peel v. Tatlock* (2) a question arose how far the concealment of the servant's embezzlement for three years after the termination of the service would affect the liability of the surety. No decision was, however, given on that point, and the case contains only a dictum of Eyre, C.J., that an industrious (by which we presume he meant an intentional or fraudulent) concealment might have an effect on the liability of the guarantor. In *Smith v. Bank of Scotland* (3), there is an observation of Lord Redesdale made in the course of the argument, which has a closer bearing on the present question. In that case Paterson, the bank agent, seems to have given security to the bank, apparently at the commencement of his service: afterwards, and while the service continued, and after his accounts had been inspected and reported on by an officer of the bank, he was called on to give additional security, and Smith, the appellant,

(1) 2 Ves. 540, 543.

(2) 1 B. & P. 419, 423; and see p. 421.

(3) 1 Dow, at p. 287.

1872
PHILLIPS
v.
FOXALL.

gave a bond as such additional security. Smith raised an action of reduction of this bond, and in that action insisted on his right to inspect the above report of the officer of the bank. On this Lord Redesdale observed, "Supposing the report shewed that Paterson was no longer trustworthy, and the bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all the consequences of subsequent transactions as contrary to the faith of the contract. And then it might be a question what bearing this circumstance might have on the new sureties." The cases to which Lord Redesdale alludes are not mentioned, but it seems pretty clearly to have been his opinion that if the master discovers the dishonesty of his servant during the service, and afterwards continues to trust him notwithstanding, the surety for the servant would be discharged from all liability for subsequent losses. In the case of *Shepherd v. Beecher* (1) before Lord Chancellor King, a father, on binding his son apprentice, gave a bond for his fidelity. Some years afterwards the apprentice embezzled 200*l.* of the master's money, of which the master gave notice to the father, and demanded the money. The father paid the amount, but sent a letter requesting the master not to trust the apprentice with cash in future, or at least to do so very sparingly. The apprentice continued afterwards with the master for several years, and committed further embezzlements of which the father had no notice until two years after the expiration of the apprenticeship, when the bond was put in suit. The Lord Chancellor held that the father continued bound, stating apparently as the ground of his judgment, "that the father ought not to have satisfied himself with sending the letter and taking no further care of the matter, but should have endeavoured to make some end with the master, and to have got up the bond." This decision seems to us to rest on the fact that the father, instead of taking measures to have the bond delivered up, as he might have done, assented to continue bound after he had notice of the first embezzlement, and that the other embezzlements were not actually ascertained until after the expiration of the apprenticeship.

It is well established that a surety, after he has been discharged from his contract by the act of the creditor, may revive his

(1) 2 P. Wms. 238, 290.

liability by a subsequent promise or assent: *Mayhew v. Crickett* (1); *Smith v. Winter*. (2) In the present plea it is alleged as a conclusion of law that, by reason of the concealment, the defendant was prevented from revoking the guarantee and compelling Smith to pay the money for which the defendant was liable. The discharge of the surety in the present case seems to us to arise rather out of the nature and equity of the contract between the parties, than upon any assumed right of revocation. We think the surety is discharged unless he assents or agrees, after he has had knowledge of the dishonesty, that the guarantee shall hold good for the subsequent service; but, as a revocation of the guarantee as soon as the dishonesty has come to his knowledge will be the best evidence of dissent, whether his discharge from the contract is founded on express revocation, or want of assent after notice of the dishonesty, seems rather a question of words than of substance.

In *Parsons on Contracts*, vol. ii. p. 31, the rule as to the right to revoke a guarantee like the present is thus stated: "If the guarantee be to indemnify for misconduct of an officer or servant, the promise is revokable, provided the circumstances are such, that when it is revoked, the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties." No judicial authority is cited in support of this proposition, and therefore it can only be cited as the opinion of the writer. It will be seen that he confines the right of the surety to revoke his guarantee to those cases where the master may, on the revocation being made, dismiss the servant without injury to himself. The present case is distinctly within the limitation, and there can be no doubt but that the right of the master at once to discharge the servant on discovering his dishonesty, and so place himself in statu quo, is a most material ingredient in the consideration of the question.

Since the argument of this case, the judgment of Malins, V.C., in *Burgess v. Eve* (3) has been published. The chief question in that case was whether the contract before the Court was or was not a continuing guarantee, but in the course of his judgment the Vice-Chancellor expresses an opinion which directly applies to the

1872

 PHILLIPS
v.
FOXALL.

(1) 2 Swan. 185.

(2) 4 M. & W. 454.

(3) Law Rep. 13 Eq. 450, 458.

1872

PHILLIPS
v.
FOXALL.

present case. "My opinion is" (he says), "and I have no hesitation in expressing it, that a person who gives a guarantee would have a right to say to the person taking it, 'You will continue at your own peril to employ the person on whose behalf I gave the guarantee;' provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the persons giving that guarantee for him. If the employer under such circumstances refused to give the guarantee up, the person giving it would have a right to file a bill in this court, and in my opinion would succeed in the contest, because the Court would direct the bond to be delivered up to be cancelled." And the same opinion is repeated in other parts of his judgment. It may be said that this opinion was not necessary for the decision of the case before the Vice-Chancellor; and is not therefore a binding authority. That may be so, but the opinion seems to us to be founded on equity and good sense, and as such we adopt it as directly applicable to the case now before us. For these reasons we think that the plea is good, and that the defendant is entitled to our judgment.

BLACKBURN, J. This was a demurrer to a plea which was argued before my Lord and my Brothers Lush, Quain, and myself in last term, the decision of which involves a question of some difficulty. I have with some hesitation come to the same conclusion as the rest of the Court, but as I do not quite agree in all the reasons given by them, I prefer stating my own reasons.

The declaration is on a contract of guarantee to the plaintiff to an amount not exceeding 50*l.*, as surety for one Smith during the course and continuance of his employment by the plaintiff. I must first observe that I think on this declaration the defendant must be taken to have agreed to be surety during the employment, and cannot withdraw from his guarantee, unless something new occurs to give him that right.

The defendant pays money into court to cover Smith's defalcations up to a particular date, viz., the 20th of November, 1869; and as to the defalcations subsequent to that date pleads, on equitable grounds, that on that date the plaintiff became aware that Smith had embezzled moneys for which the defendant was respon-

sible, that she, without informing the defendant of this, allowed Smith to continue in her service, and to pay off the amount of his defalcation, and that the defendant was wholly ignorant of Smith's guilt. The plea then states, as conclusions of law, that owing to the non-disclosure of this fact by the plaintiff, the defendant was prevented from immediately revoking his guarantee, and in consequence is in equity discharged.

I think that the first question to be considered is, what would be the right of the surety on being informed that the servant had committed a fraud; for, if his knowledge of that fact would have given him no rights, the concealment could not prejudice him. I still adhere to the opinion that I expressed in *Lee v. Jones* (1), that if such a transaction as is alleged in the plea had taken place before the defendant entered into the contract of suretyship, and had been concealed from him, it would have furnished evidence of a false representation to the surety that no such thing existed, made by the plaintiff to the surety for the purpose of inducing him to enter into the contract of suretyship, and would therefore afford evidence in support of a plea of fraud. Further than this I am not prepared at present to go, and it is to be remembered that a minority in the Exchequer Chamber refused to go so far. Still I act on that as being established law; but I cannot concur in the conclusion from these premises that therefore there is a condition implied by law on every contract of suretyship for a servant that it shall become void if the servant afterwards commits a fraud, and the principal on hearing of it does not inform the surety of it. It is quite clear that misconduct of the servant does not alone put an end to the contract, for the very object of the suretyship is to afford protection against the misconduct of the person whose good conduct is guaranteed. And I find no authority for saying that there is such an implied condition. *Shepherd v. Beecher* (2) is a distinct authority that even in equity the effect is at most to render the contract voidable at the option of the surety: for it was there decided that the father, who, on becoming aware of the misconduct of his son for whom he was surety, took no steps to get rid of the suretyship, remained liable.

1872

 PHILLIPS
v.
FOXALL.

(1) 17 C. B. (N.S.) 507; 34 L. J. (C.P.) 131.

(2) 2 P. Wms. 288.

1872

PHILLIPS
v.
FOXALL.

But there is a ground on which I think he may have a ground for being discharged in equity, which I will now state. A surety, as soon as his principal makes default, has a right in equity to require the creditor to use for his benefit all his remedies against the debtor; and as a consequence, if the creditor has by any act of his deprived the surety of the benefit of any of those remedies, the surety is discharged. The authorities for this, as far as known to me, are collected in the judgment to *Bailey v. Edwards* (1), and this equitable principle has, at least in the case where time has been given to the principal without the consent of the surety, been adopted to some extent at least, although whether to its full extent has been doubted: see *Pooley v. Harradine* (2). But it is not now material to decide that. Now the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned. This right the master may use for his own protection. If this right to terminate the employment is one of those remedies which the surety has a right to require to have exercised for the surety's protection, it seems to follow that, by waiving the forfeiture and continuing the employment without consulting the surety, the principal has discharged him. It never has been determined, as far as I can find, in any case in equity, that the surety has this right. There are dicta tending that way. In *Shepherd v. Beecher* (3) Lord Chancellor King says the surety "ought not to have satisfied himself with sending the letter, but should have endeavoured to have made some end with the master, and to have got up the bond"—expressions which seem to shew that the Lord Chancellor thought he might have got up the bond. In *Smith v. Bank of Scotland* (4) Lord Redesdale is reported to have said during the argument, when considering whether the appellants had, according to the law of Scotland, a right to inspect a report from the agent of the bank to the directors, "Supposing

(1) 4 B. & S. 770; 34 L. J. (Q.B.) 41. *11 Jan 45. 136*

(2) 7 E. & B. 431; 26 L. J. (Q.B.) 156.

(3) 2 P. Wms. at p. 239.

3 Jan 45. 138 (4) 1 Dow, at p. 237.

the report shewed that Paterson" (the person for whom the appellants became sureties) "was no longer trustworthy, and the bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all the consequences of subsequent transactions, as contrary to the faith of the contract." But no such decided cases are now to be found, and the dictum is not again noticed in the judgments either of Lord Eldon or Lord Redesdale. No other authority was cited during the argument, nor, as far as we are aware, was there any then in print. And at the close of the argument I was much inclined to say that no such equity was established. But, singularly enough, the case of *Burgess v. Eve* (1) has been printed since the argument, and there Malins, V.C., says: "But if there is misconduct on the part of the person whose fidelity is guaranteed, for instance, if a man guarantees that a collecting clerk shall duly account for all moneys received by him, and that collecting clerk is found to have embezzled his employer's money, reason requires that the man who entered into the guarantee because he believed the person to be of good character, when he finds he is not so, and not to be trusted, should have the power of saying 'I now withdraw the guarantee I gave you; I give you full notice not to trust him any more.' Notwithstanding all that has been said, I am clearly of opinion that a person who has entered into such a guarantee, and who is therefore responsible for the person whose fidelity is guaranteed, has a right to withdraw from that guarantee when that person has been proved guilty of dishonesty." He afterwards proceeds: "My opinion is—and I have no hesitation in expressing it—that a person who gives a guarantee would have a right to say to the person taking it, 'You will continue at your own peril to employ the person on whose behalf I gave the guarantee,' provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the person giving the guarantee for him. If the employer under such circumstances refused to give the guarantee up, the person giving it would have a right to file a bill in this court, and in my opinion would succeed in the contest, because

1872

 PHILLIPS
 v.
 FOXALL.

(1) Law Rep. 13 Eq. 450, 457.

1872
PHILLIPS
v.
FOXALL.

the Court would direct the bond to be delivered up to be cancelled. And I think that is only what good sense, propriety, and fair dealing between man and man would dictate." These expressions are singularly closely in point; they, though by no means irrelevant to the point then before the Vice-Chancellor, were not part of his decision. What he says is not therefore, perhaps, strictly binding upon us as a decision would be. But it seems to me consistent with justice; and without determining whether we should have ventured to lay down such an equity ourselves, I think we should follow the opinion of the Vice-Chancellor on a subject with which he is so much more conversant than we are. I therefore agree on this ground, and on this ground only, that judgment should be given for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Travers Smith & De Gex.*

Attorneys for defendant: *Merriman, Powell, & Co.*

EVERINGHAM *v.* IVATT, AND OTHERS.1872
July 6.

Copyhold, Devise of, for a term of Years with Remainder over—Right of Lord to compel Termor to be admitted.

A copyholder in fee devised his estate to trustees for a term of years, and subject to the term to A. in fee. A. was admitted and paid a full fine; the admittance on the roll recited the will, and stated that "the lord by his steward delivered to A. seisin of the lands by the rod to hold the same to him and his heirs and assigns for ever according to the purport and effect of the said will; and saving the rights of the lord and all other persons, the said A. was admitted tenant thereof in manner aforesaid. And he paid his fine and relief, but because the said A. is an infant the custody as well of his person as of the premises aforesaid is committed to the guardians of the infant." After the admittance of A. the lord made proclamations, and the trustees refusing to be admitted, he seised quousque:—

Held, that, as by the form of the admission A. was admitted in presenti and not merely to the remainder, the lord had both a tenant on the roll and a full fine, and therefore could not force the trustees to come in and be admitted.

Admitted in Roll 22003380
CASE stated in an action of ejectment after appearance.

The material facts are stated in the judgment of the Court.

April 19, 20. *Joshua Williams, Q.C. (J. O. Griffiths with him)*, for the plaintiff.

Field, Q.C. (W. R. Cole with him), for the defendants.

The arguments are given in the judgment; all the authorities there noticed were cited; the following were also cited: 1 *Watkins on Copyholds*, pp. 243, 282; pp. 302, 342, ed. by Coventry; *Gilbert on Tenures*, p. 171, citing *Gursey v. Sanderson*; *Seriven on Copyholds*, 5th ed. pp. 202, 213. *Right v. Bawden* (1); *Lord Londesborough v. Foster* (2); *Wilson v. Hoare* (3); *Roe v. Hutton* (4); *Church v. Mundy* (5); *Doe v. Jenney* (6); *Brown's Case* (7); 2 *Williams's Executors*, 6th ed., 1276; *Com. Dig. Administration* (C. 5); *Doe v. Lawes* (8); *Dell v. Higden* (9); *Kite v. Queinton* (10).

Cur. adv. vult.

(1) 3 East, 260.

(7) 4 Rep. 22 b, note (D. 1) by

(2) 3 B. & S. 805; 32 L. J. (Q.B.) 225. Thomas.

(3) 2 B. & Ad. 350.

(8) 7 A. & E. at p. 210.

(4) 2 Wils. 162.

(9) Moore, 358, cited in Coke's Law

(5) 12 Ves. 426, 431.

Tracts, by Hawkins, p. 162.

(6) 5 East, 522.

(10) 4 Rep. 25 a.

VOL. VII.

3 E

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(2) SC of Jones H.S. 1173

1872

EVERINGHAM

v.

IVATT.

July 6. The judgment of the Court (Blackburn, Hannen, and Quain, JJ.) was delivered by

HANNEN, J. This was an action of ejectment by the lord of the manor of Rampton Lyles, in the county of Cambridge, to recover certain lands parcel of the said manor.

Thomas Ivatt, a customary tenant of the manor, was seised in fee of the lands in question at the will of the lord, according to the custom of the manor, and being so seised died the 15th of August, 1869, having devised these copyhold lands, inter alia, to trustees for a term of 500 years upon certain trusts (1); and subject to the said term to his nephew Charles Edward Ivatt, his heirs and assigns absolutely. The will was duly enrolled on the roll of the manor.

On the 24th of November, 1869, the lord, after some negotiations, admitted the said Charles Edward Ivatt (then an infant) to hold "to him, his heirs, and assigns for ever according to the purport and effect of the said will" of Thomas Ivatt, and upon such admission received a fine of 88*l.* 10*s.* 6*d.*

8QB394 As some argument was founded on the terms of the admission it will be useful to set it out more fully: After reciting the death of Thomas Ivatt seised of the said lands, the admission states that because no person came to be admitted tenant thereto proclamation was duly made, &c., and that Charles Edward Ivatt, by his attorney, produced the probate of the will of Thomas Ivatt (which is set out), and thereupon prayed of the lord of the said manor to be admitted tenant to the hereditaments and premises devised to him by the will of the said Thomas Ivatt, to whom the lord of the said manor, by his steward, granted and delivered seisin thereof by the rod to have and to hold the same premises with their appurtenances unto the said C. E. Ivatt, his heirs, and assigns for ever, according to the purport and effect of the said will." . . . "And saving the rights of the lord and all other persons, the said C. E. Ivatt was admitted tenant thereof in manner aforesaid, and he paid his fine and relief, but his fealty was respited because, and so forth. And because the said C. E. Ivatt is an infant, the custody as well

(1) The trusts were still existing.

of his person as of the premises aforesaid with the appurtenances is committed to the guardians of the infant, until, &c.”

1872

EVERINGHAM

v.

IVATT

After this admission proclamations were duly made for the heir, devisee, or other persons having any estate or interest in the property, to come in and be admitted; and, as the trustees under the will of the said term of 500 years did not answer to the said proclamations, and refused to be admitted for the said term, the lord seized quousque.

The question in the case is, whether, notwithstanding the admission of C. E. Ivatt, the lord was entitled so to seize.

For the plaintiff it was contended, that the admission of C. E. Ivatt was null and void to all intents and purposes, or if not, that, at any rate, it was only an admission in futuro after the expiration or determination of the term, and that the lord was entitled to a tenant in præsentî.

For the defendants it was argued that the admission of C. E. Ivatt, he being entitled in remainder, was an admission in præsentî of a tenant to the whole estate, or, at any rate, that the lord was estopped from asserting that the possession was vacant, he having admitted a tenant from whom he had received a fine.

There can be no doubt that, upon the death of his tenant, the lord is entitled to have a fresh tenant on the roll, and he is entitled to a tenant, not merely in respect of a future interest, but to one in respect of the present possession of the estate. Primâ facie the customary heir is entitled to be admitted, as in the absence of a devise by the deceased tenant the heir would be entitled to the present possession; and if the heir claims admission the lord cannot seize quousque for want of a tenant: *Garland v. Mead*. (1) If there be a devise of the copyhold, then the devisee entitled to the present possession is the person who ought to be admitted. Thus, if there be a devise to a tenant for life or years, with remainders over, the tenant for life or years is entitled to be admitted. If he is so admitted, his admission is the admittance of all in remainder: *Brown's Case*. (2) But if he be not admitted the remainderman is not entitled to be admitted, unless by the custom of particular manors, which is not found to exist in this case: *Dean of Ely v. Caldecot*. (3)

(1) Law Rep. 6 Q. B. 441. (2) 4 Rep. at fol. 22 b. (3) 8 Bing. 439.

1872

EVERINGHAM

v.
IVATT.

The rights and duties of the lord in such a case are clearly expressed by Lord Cranworth in *Glass v. Richardson* (1): "A testator disposing of a copyhold by his will does no more than name the person whom the lord will admit . . . All that the lord can insist on is that he shall never be without either a tenant or the possession of the land, and this is effectually secured to him by his right of seizing the land quousque upon the death of the tenant, unless the heir, or some one claiming under the testator's will, comes in and is admitted."

It does not follow that in the present case the lord would have been bound to admit the remainderman; but the question is, what is the effect of such an admission having been made. In the first place, the language of the admission is appropriate to an admission to present possession, rather than to a future estate. The ordinary symbol of actual transfer of possession, the delivery of the rod, is made use of; and the rendering of *immediate* suit and service is contemplated, for it is only respited till C. E. Ivatt comes of age, not till his estate comes into possession, and the custody of the premises with the appurtenances is committed to the guardians. Therefore upon the tenant coming of age he would be bound, according to the terms of the admission, to do all that any ordinary tenant in possession would be bound to do.

It is further to be observed that in those manors where it is the custom to admit remaindermen as such the language is different to that which is used in the present case. Thus in the manor referred to in *Dean of Ely v. Caldecot* (2) remaindermen are admitted in such terms as these, "admitted in remainder expectant on the decease of;" "admitted to the reversion when it shall happen after the death of." For the plaintiff it was contended that the words, "according to the purport and effect of the will," were equivalent to these expressions; but the reasonable construction of the terms of the admission seems to be, that the lord thereby admits C. E. Ivatt as tenant in præsentî, with a saving of the rights of all other persons under the will, just as, if he had admitted the tenants for years with similar words, he would have admitted them in præsentî, with a saving of the rights of the remainderman under the ultimate devise to him.

(1) 2 D. M. & G. at p. 662.

(2) 8 Bing. at p. 443.

17 Jan 97

It was strongly contended on behalf of the plaintiff that, if the admission was to anything other than the remainder, it was void altogether as deviating from the surrender, that is, in this case the will; and for this proposition the authority of Lord Coke in his *Complete Copyholder*, p. 92, was cited. (1) But, as already observed, sufficient effect will be given to this authority by holding that it means that an admission which does not follow the surrender or will is void as against the parties interested, but not that the lord cannot be estopped from alleging that his own act was altogether void. But, in fact, the admission of the remainderman as tenant in *præsent*i accompanied by the words, "according to the purport and effect of the will," is not necessarily a departure from the directions contained in the will. The lord does not usually know, and is not bound to inquire, whether the previous estates have been determined. It may be that, if he does inquire and find that they have not, he may refuse to admit the remainderman; but if the remainderman presents himself for admission, the lord, who sees from the will that he is a person who may be entitled to it, is at liberty to admit him, thereby enabling him when admitted to maintain his rights, whatever they may be, against others claiming under the will, or otherwise. When he has done so, and received a fine for doing it, it is manifestly unjust that he should assert that his own act was wholly void; and, in the absence of authority compelling us to do so, we cannot so hold.

It was contended for the defendants, that the doctrine, that the admittance of the tenant for life or years is the admittance of those in remainder, was an authority for the converse proposition that the admittance of the remainderman is the admittance of the tenant for life or years. The case chiefly relied on in support of this contention is *Gyppen v. Bunney*. (2) Popham, C.J., there says: "Tenant for life and he in remainder have but one estate in law; and, therefore, the admittance of the one shall serve the other as a livery or attornment." We think, however, that this dictum must be construed, with reference to the case before him, where the tenant for life had been admitted. And even if the admittance of the remainderman be the admittance of the tenant for years, still it can

1872

EVERINGHAM
v.
IVATT.

(1) Coke's Law Tracts by Hawkins, sect. 41, p. 109, ed. of 1673; p. 111, ed. of 1641.

(2) Cro. Eliz. 504.

1872
 EVERINGHAM
 v.
 IVATT.

only be in the same sense as the admittance of the tenant for life or years is said to be the admittance of the remainderman, that is, without prejudice to the lord's right to his fine, if it could otherwise be due, and to an actual admittance in order that he may have it. This is explained by Tindal, C.J., in the *Dean of Ely v. Caldecot* (1) where—after citing from 4 Rep. 22 b., the following passage: "The admittance of the tenant for life is the admittance of him in remainder to vest the estate in him, but shall not bar the lord of his fine, which he ought to have by the custom;"—he says, "He (Lord Coke) "puts the tenant in remainder in such a case upon the same footing as the heir, who, though he is in by the admittance of his ancestor, *may nevertheless be compelled to come in and be admitted*, in order that the lord may have his fine, due by the custom of the manor, upon the descent." This seems but reasonable, and we should therefore hold that, even if the admittance of the remainderman operated as a constructive admittance of the tenants for years, it would only be so as to vest the estate in them, and would leave unaffected the right of the lord to have them actually admitted in order that he might have his fine if he can be shewn to be entitled to it.

The main reliance of the plaintiff was placed on the case of the *Earl of Bath v. Abney*. (2) In that case, as in this, copyholds were devised to trustees for a term of years, with remainder to Lord Bath for life, and remainders over. On the death of the testator the trustees were admitted and paid a fine for the term. This admission operated as an admission of the Earl of Bath so as to vest his estate. On the death of the trustees, the defendant, the lady of the manor, caused proclamation to be made for somebody to come in and take the estate; whereupon the Earl of Bath and the other remaindermen filed a bill to restrain the defendant from bringing ejectment; and the Court of Chancery directed a case to be stated for the opinion of the Court of Queen's Bench, to say whether the executor of the surviving trustee of the term was obliged to be admitted, and the Court of law held that he was. Unfortunately, as the Court, according to the usual practice, only gave a certificate of its opinion, we are not in possession of its reasons to serve as a guide in applying it; but it is to be observed, that the only question in

(1) 8 Bing. at p. 448.

(2) 1 Ken. 471; 1 Burr. 206.

dispute was whether the executor of the surviving trustee was bound to come in and be admitted and pay a further fine during the continuance of the term. The subsistence of the term was necessarily insisted on by Lord Bath; and it was clear that he had only been constructively admitted to his remainder expectant on the determination of the term. If Lord Bath had been actually admitted, the question would have been different; it would then have been necessary, as in the present case, to consider the meaning and effect of the actual admission; as it was, there could be no doubt that he had not been admitted to anything more or other than his estate in remainder expectant on the term, and consequently as Lord Bath was not tenant in præsentī during that term, the lord had no tenant in præsentī to do the services.

The amount of fine taken by the lord, though by no means conclusive, is not to be disregarded in considering the nature of the admission of E. C. Ivatt. If he had been admitted to his remainder only expectant on a lease of 500 years, it would naturally be much less than a full fine. The lord may apportion the fine according to the value and nature of the interest to which he admits. Here a full fine was required and paid. In *Blackburne v. Graves* (1) Hale, C.J., says: "I do not see any inconvenience why the admission of a tenant for life or years should not be the admittance of all in remainder, for fines are to be paid notwithstanding by the particular remainders; and so the books say it shall be no prejudice to the lord. . . . It shall not prejudice the lord; for if a fine be assessed for the whole estate, there is an end of the business; but if a fine be assessed only for a particular estate the lord ought to have another."

In this case the interests of the lord appear to have been amply protected by the exaction of a full fine, and we think, for the reasons given, he has failed to establish that he ought to have another.

Judgment for the defendants.

Attorneys for plaintiff: *Remnant & Penley.*

Attorneys for defendants: *Cole, Cole, & Jackson*, for *Francis Webster, & Riches, Cambridge.*

1872

FEARON, APPELLANT; MITCHELL, RESPONDENT.

May 29.

Market—Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), s. 13—Selling or exposing for Sale within the Limits of a Market—"Own Dwelling-place or Shop"—Sale of Sheep by Auction—"Right, Power, or Privilege," within s. 50 of Local Government Act, 1858 (21 & 22 Vict. c. 98.)

1QB.D. 60

2QB.D. 180

12Q.B. 470; 3

475

A market was duly opened in 1871 by the local board, under the Local Government Act, 1858, and the Markets and Fairs Clauses Act, 1847. The respondent was charged by the appellant with infringing s. 13 of the latter Act by selling twelve sheep in a place other than the market not being his own dwelling-place or shop. The justices refused to convict under the following facts:—The respondent had erected in 1865, under the approval of the local board, a large building called the "Agricultural Hall," capable of holding 100 head of cattle, with a large open yard with fixed pens capable of holding 1400 sheep. The hall and yard were the private property of the respondent, and in his own occupation. The respondent's dwelling-house adjoined and communicated with the yard. The respondent was in the habit of advertising and holding sales by public auction every Monday, which is the market day, the average sale each Monday being about 100 cattle and 1000 sheep. The cattle and sheep so sold were the property of farmers and others, the respondent charging the vendors a commission and guaranteeing payment of the amount of the sales. The offence proved was the sale of twelve sheep in the hall on a Monday, the hall being within the district of the board, and tolls being taken for the sale of sheep in the market:—

Held, on appeal, that the justices ought to have convicted; for that the sale was not within the respondent's own shop within the meaning of s. 13.

Held also, that the respondent, by the establishment of his business under the approval of the local board, had not acquired any right, power, or privilege within s. 50 of the Local Government Act, 1858.

CASE stated by Justices of Cumberland under 20 & 21 Vict. c. 43.

An information was preferred by the appellant against the respondent, charging that the respondent on the 15th of May, 1871, at the town of Cockermouth, not then being a licensed hawker, unlawfully did sell and expose for sale in a certain place there called the "Agricultural Hall," within the district of the local board for the township of Cockermouth, in which said township the Local Government Act, 1858 (21 & 22 Vict. c. 98), has been duly adopted, but not within the market there regulated by the said Local Government Act, and the bye-laws made by the said local board in pursuance of the said Act, and the provisions of the Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), with the first-mentioned Act incorporated, and there opened for public

use within the said district, nor within his own dwelling-place or shop there certain marketable articles, to wit, twelve sheep, in respect of which toll was by the said Acts and the bye-laws made as aforesaid authorized to be taken in the said market, contrary to s. 13 of the Market and Fairs Clauses Act, 1847 (10 Vict. c. 14.)

Upon the hearing the justices dismissed the information.

The following facts were agreed to:—The Local Government Act, 1858 (21 & 22 Vict. c. 98), was in 1863 adopted by the township of Cockermouth, and has been in force there since the 1st of January, 1864. The local board for the township on the 20th of March, 1869, pursuant to the Local Government Act, 1858, and the Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), made bye-laws for the regulation of markets and fairs held within their district, and they were duly confirmed by the secretary of state on the 29th of April, 1869, by which the market was to be held in a certain field on every Monday, and tolls were authorized to be taken, *inter alia*, for sheep. The field specified in the bye-laws is the place prescribed by the local board for holding the cattle and sheep market, and was on the 15th of May, 1871, opened for public use. At the time of the adoption of the Local Government Act, 1858, by the township of Cockermouth, and previously thereto from time immemorial, markets for the sale of cattle, sheep, grain, &c., were held in the town of Cockermouth, in the said township, on every Monday, and the local board are now the owners of such markets. No evidence was offered that tolls had been collected upon such sales.

The respondent was proved, on Monday, the 15th of May, 1871, to have sold twelve sheep, as alleged in the information, but it was contended on behalf of the respondent that inasmuch as the sheep were not sold within the field, or space, prescribed by the bye-laws of the board for holding the markets, but within the respondent's own private and exclusive premises in the ordinary way of trade, they were not tollable under the bye-laws.

The Agricultural Hall was erected by the respondent in the year 1865, on plans submitted to and approved of by the local board, with knowledge that it was the intention of the respondent to use the same as an auction mart for the sale of cattle, sheep, &c.

The Agricultural Hall is a large building of brick, stone, and

1872

FEARON
v.
MITCHELL.

1872
FEARON
v.
MITCHELL.

mortar, and slated, and contains a large ring or area in which the respondent sells, and stalls for the accommodation of about 100 head of cattle. On the east side and partly across the south end of the hall and adjoining and communicating with it is a large open yard with fixed pens capable of holding 1400 sheep, and in which sheep are penned till required in the hall for sale.

The Agricultural Hall and yard are both the private property of the respondent, built on his own private land at his own cost, and are in his own occupation. The respondent's dwelling-house, which is also his own property, adjoins and communicates with the yard, but not with the Agricultural Hall. The dwelling-house is separated from the Agricultural Hall by the respondent's harness-room and stable, also in his occupation.

The respondent advertises and holds sales by public auction in the Agricultural Hall every Monday, of cattle, sheep, horses, &c. The average sale in the Agricultural Hall on each Monday amounts to about 100 cattle and 1000 sheep, much exceeding the sales in the market regulated by the board held on these days.

The respondent also holds many other sales of cattle, horses, and sheep, in the same place, on other specified days throughout the year. The respondent also uses the Agricultural Hall for furniture and other sales.

The cattle, sheep, horses, &c., so sold by the respondent in the Agricultural Hall, are the property of farmers and others, who take them there for sale from all parts of the county. The respondent charges the vendors a commission on the sales, and guarantees payment to them of the amount of the sales.

The respondent has been an auctioneer for twenty-two years, and for sixteen years previous to erecting the Agricultural Hall was accustomed to hold sales by public auction at Cockermouth on market and other days, in the streets, and elsewhere in the town of Cockermouth, without molestation or interruption, and no toll was ever demanded or received by any person on account of such sales, save that the respondent paid tolls for pens for holding sheep, which he put up upon the street on these occasions, the same as other persons who put up pens for the same purpose, or put up stalls on the said street, for the sale of wares, on market days.

The question of law arising on the above statements is: whether the place where the sheep were sold was or was not the respondent's "own dwelling-place or shop," within the meaning of the exception in s. 13 of the Market and Fairs Clauses Act, 1847 (10 Vict. c. 14), which enacts that "after the market-place is opened for public use, every person, other than a licensed hawkers, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s.

1872

 FEARON
 v.
 MITCHELL.

Manisty, Q.C. (*C. Hutton* with him), for the appellant. The respondent was within the enacting part, and not within the exception of s. 13 of the Market Clauses Act, 1847 (10 Vict. c. 14). It is clear that these sales by auction were not a sale in the respondent's own dwelling-place or shop, but really amounted to a rival market: *Pope v. Whalley*. (1) The case of *Llandaff Market Co. v. Lyndon* (2) is a direct authority that a sale of animals by auction is a sale of articles within the meaning of the Act, and is also a direct authority that a sale in an auction mart is not within the respondent's own dwelling-place or shop.

Sir J. B. Karlake, Q.C. (*J. Brown, Q.C.*, and *Crompton* with him), for the respondent. This was a sale by the respondent clearly on his own premises, and his dwelling-place is adjoining, thus distinguishing the case at once from *Llandaff Market Co. v. Lyndon*. (2) But, moreover, it is not necessary, under the exception in s. 13, that the shop should be attached to the dwelling-house, as was the case in the local Act under which that case was decided. Surely an auctioneer's room is just as much his shop as any other room in which sales are transacted. A wide construction must be put upon the exception, as was held in *Ashworth v. Heyworth*. (3) If a horse-dealer buys horses, and keeps them in his stables, and then sells them in his office, is he not within the exception? And if so, why is not the respondent? That a sale by auction may be a sale in a shop, within the exception, was expressly decided

(1) 6 B. & S. 303; 34 L. J. (M.C.) 76. *11 June 1844*

(2) 8 C. B. (N.S.) 515; 30 L. J. (M.C.) 105. (3) Law Rep. 4 Q. B. 316.

6 June 1844

1872
FEARON
v.
MITCHELL.

in *Wiltshire v. Willett*. (1) Secondly, the respondent's premises were built under the express sanction of the board, long before their own market-house was erected, and s. 50 of 21 & 22 Vict. c. 98, which enabled them to set up the market, expressly provides that "no market shall be established in pursuance of this section, so as to interfere with any rights, powers, or privileges, enjoyed within the district, by any person, . . . without his consent."

Manisty, Q.C., was not heard in reply.

COCKBURN, C.J. I am of opinion that our judgment must be for the appellant. The case, I think, comes within s. 13 of 10 Vict. c. 14. There is no doubt that a market had been lawfully established, and that the things sold were within s. 13, as articles in respect of which tolls were authorized by the special Act to be taken in the market. The only question is whether the case comes within the description of articles sold or exposed for sale in the respondent's own dwelling-place or shop. The facts are shortly these:—The respondent has premises of a very considerable area; he has a building called the Agricultural Hall, and contiguous to it there is a yard capable of holding 1400 sheep, while the building itself is capable of holding 100 head of cattle. Under that state of facts it is impossible to say that the sale took place in the dwelling-place of the respondent; for the place is entirely separated from his dwelling-house; and assuming (contrary to my own opinion) that a distinction was intended by the use of the phrase "dwelling-place" instead of "dwelling-house," which occurs in some of the other statutes, and that "dwelling-place" may apply to somewhat larger and more extensive premises than the term "dwelling-house" would apply to, yet I do not think that in any sense of the term can these premises be said to be the dwelling-place of the respondent, separated as they are from the place in which he lives. Then is it his shop? I am of opinion that it is not. It cannot, in any proper sense of the term, be called a shop. I agree that there may be cases in which the term "shop," in its popular sense, would not be applicable to the premises in which things were sold or exposed for sale, and yet, by a liberal and rational

(1) 11 C. B. (N.S.) 240; 31 L. J. (M.C.) 8.

construction of the Act, the premises might be considered as within the exception of "shop." Take, for instance, the place of business of a horse-dealer who has stables in which he keeps horses for sale, either as his own or on commission. Although tolls are payable for the sale of horses in the market, it would be perhaps too much to say that the horse-dealer is not at liberty to sell horses on his own premises, as not being within the exception of "shop" in the statute. I think we might say that, on a fair construction, the horse-dealer's premises were a "shop" within that term as used in s. 13. But each case must depend on its particular circumstances. Although, as I have said, the premises of a horse-dealer might come within the exception, it is a very different thing when we have to deal with an extensive area like the present, which is, in fact, nearly as extensive as the market-place itself. It is true that the auction itself took place in a building, but the sheep and other things the subject of the sale were exposed for sale in this large yard and kept there. To say that this could be a "shop" within the meaning of this section would be, as it appears to me, quite unreasonable. I own my individual opinion is rather strong against an auctioneer's premises being a "shop" at all within the meaning of the section, but it is not necessary to determine that. Assuming that an auctioneer's premises might be a shop for the purposes of selling, so as to come within the exception, it seems to me impossible to say that these extensive premises, being in the open air and capable of holding so many hundred sheep, can in any sense of the term be brought within the description of a shop.

The other question remains to be disposed of, as to whether the case comes within the proviso of s. 50 of 21 & 22 Vict. c. 98, that "no market shall be established in pursuance of this section so as to interfere with any rights, powers, or privileges enjoyed within the district by any person, without his consent." This right, which the respondent was enjoying at the time when this market-place was built, was not, I think, a right within the meaning of the section. It was a right which he enjoyed only in common with the rest of Her Majesty's subjects. He had no exclusive right to carry on this business, and he had no greater right than anybody else with suitable premises for setting up and carrying on a similar

1872

FEARON
v.
MITCHELL.

1872
FEARON
v.
MITCHELL.

business. The word "rights," especially when taken in conjunction with the words "powers or privileges," must mean rights acquired adversely to the rest of the world and peculiar to the individual. Such a right having been acquired, it is but just that the statute should say that any powers exercised by the local authority under the section in setting up a market should not interfere with it; but it could never have been meant that the powers given for the benefit of the inhabitants of the particular district in setting up a market should not be exercised in consequence of some private individual or company having a business of the same description. I, therefore, think that s. 50 does not apply; and, consequently, the case being within s. 13 of the former Act and not within the exception, our judgment must be for the appellant.

BLACKBURN, J. I am of the same opinion. We must first consider what were the objects of the Markets Clauses Act, and what were the motives for passing it. Originally it was considered a great benefit to towns to give them a fair or market, and this was thought so beneficial that it was thought right not only to give the fair or market but to grant a charter so as to prevent persons from disturbing the market. With reference to this I may refer to what I said in *Pope v. Whalley* (1), which has been cited. There may be by ancient prescription a market with the right of preventing the selling in any way whatever within the limits of the market, even in a private shop, marketable goods on the market day. This was decided in *Mosley v. Walker*. (2) But it was intimated by the Court of Exchequer in *Mayor of Macclesfield v. Chapman* (3) that though that right might be established by ancient prescription, yet a modern grant of the franchise of a market would not of itself have so extensive an operation. But there cannot be much doubt that, under ever so modern a grant of a market by virtue of the Queen's prerogative, if a rival market were set up, that would be a disturbance of the franchise. The legislature may well be taken to have had that distinction in view, and may well be taken to have said, "in giving power to establish markets we will not prevent the sale of marketable goods in a

(1) 6 B. & S. at p. 311; 34 L. J. (M.C.) at p. 80. *11 June 1864*
(2) 7 B. & C. 40. (3) 12 M. & W. 16.

man's own dwelling-house or shop, but in other respects we will prevent the market being disturbed."

The question then is, what has the respondent done? Is what he does a selling in his own dwelling-place or shop? To say that he sells in his own dwelling-place is impossible, and I may pass by that. Is it a selling in his own shop? This is strictly a question of fact, and we must look at what the case states. It seems to me that though a sale by auction may in a conceivable case be a selling in a shop, yet *primâ facie* a sale by auction is not generally what you would have in your mind when speaking of selling in a shop. What are the facts here? There is an inclosed yard in which 1400 sheep and 100 head of cattle can be exposed for sale at one time. The respondent advertises and holds sales of cattle and sheep every Monday, selling thousands, the number exceeding those sold in the market, the cattle and sheep being the property of farmers and others who send them there for sale from all parts of the county. This appears to me to be—I will not say a setting up of a rival market, for the respondent had started it first—but a keeping up of a market in rivalry and to the disturbance of the market established by the local board as authorized by the statute; and I cannot think it is within the exception as a selling in the respondent's own shop. I do not pretend to give a very precise definition of where "shop" ends and where "market" begins; but I cannot doubt that the respondent has been keeping up a disturbing market.

Then s. 50 of 21 & 22 Vict. c. 98 has been relied on, under which the local board are authorized to provide a market, but which goes on to enact that no market shall be established under the section so as to interfere with any rights, powers, or privileges enjoyed within the district by any person, without his consent. Now, as the respondent had already furnished the town with what appears to have been a very good market, it was matter for consideration for the local authority how far they could interfere with the respondent's established business; but inasmuch as this business, although a market, was not one held under a franchise, the respondent had no right, power, or privilege to keep it up against any rival that chose to start, and consequently the local authority had power to set up this market although it interfered

1872

 FEARON
 v.
 MITCHELL.

12CLD4

1872
FEARON
v.
MITCHELL

with the respondent's business, which was simply an exercise of the same right as any one of the public had to set up a place for the unlimited sale of cattle and sheep. Consequently, as the local authority had power to set up their market, and the legislature by incorporating the Market Clauses Acts have given them the protection of s. 13, and as the respondent in my opinion was not simply selling in his own shop, but was really doing the thing the legislature meant to prohibit, that is, the keeping of a rival market to the disturbance of the market by law established under the statutes, our judgment must be for the appellant.

MELLOB, J. I am of the same opinion. I do not propose to express any decided opinion as to whether or not an auctioneer, holding periodical sales in an auction-room, can be said to be selling in his own shop; I should be unwilling to say that he does not. But when we have to determine whether a sale on any particular premises is a sale in a shop within the meaning of this statute, it is necessary to have regard to the nature, character, and extent of the trade which is being carried on. We find from the case that the respondent, before he built this Agricultural Hall and inclosed this yard, used to sell cattle and sheep in the streets. He now advertises periodical sales of stock, cattle and sheep, besides carrying on the proper business of an auctioneer. The inclosure is capable of holding 1400 sheep in pens, and when they were so penned in that place, I take it they were exposed for sale, although the actual sale, by knocking down the lots to the highest bidder, might take place in the hall. Looking at the size of this inclosure, and that there are stalls for 100 cattle in the hall, looking at the nature of the business carried on, it cannot be said, as it seems to me, to be carried on in a shop. It differs very little from the case of sheep penned in a field for sale, although the actual sale might take place in the auctioneer's office. It would be putting a very large construction on the exception in s. 13, if we were to say that that course of dealing, which really amounts to keeping a rival market, was a sale in the respondent's own shop.

LUSH, J. I am of the same opinion. By s. 13 it was intended to prevent an infringement of the market when established, by

providing a summary remedy; and I think it must receive such an interpretation as would make it applicable to the case of an infringement at common law of a market granted by charter. As has been observed by my Brother Blackburn, a claim may be sustained, at common law, by the grantee of an ancient market by prescription, to exclude ordinary traders even from selling marketable goods in their own shops on the market day; but the better opinion appears to be that under a modern grant no such right can be maintained. A grantee of a market in modern days would not have the right of preventing persons within the precincts of the market from carrying on their ordinary trade within their own shops on market days. This more limited right was to be the sort of right which the local board was to acquire under the statute—a right to hold a market of the same nature as a franchise which can now be granted by the Crown, but so as not to exclude ordinary traders from carrying on their business within their own houses and shops. Is what the respondent has done a carrying on a business of that description? I apprehend that it is not. The distinction is between sales analogous to market sales, open public sales, as distinguished from sales over the counter in private dwelling-houses. What the respondent has done has been to take advantage of the market day, when people are collected in the town and drawn together by the market, to open a field of his own and put up cattle pens, not for the sale of his own cattle but for the reception of cattle of other people, in order that they might be sold within the limits of the market by public auction. I think that if an action had been brought for the infringement of a market under a charter, these facts would have shewn that the respondent had infringed the right.

Judgment for the appellant.

Attorneys for appellant: *T. Speechly, for Hayton & Simpson, Cockermouth.*

Attorneys for respondent: *Johnston & Mounsey, for Benson & Moordaff, Cockermouth.*

1872

 FEARON
 v.
 MITCHELL.

1872

June 7.

GRANT v. SHAW.

*Bill of Sale—Description of Occupation of Maker and of Attesting Witness—
“Government Clerk”—“Insurance Clerk”—17 & 18 Vict. c. 36, s. 1.*

8280

In the affidavit of the execution of a bill of sale filed under 17 & 18 Vict. c. 36, s. 1, the maker was described as “government clerk;” he was a clerk in the Admiralty:—

Held, that the description was sufficient.

Semble, that “insurance clerk” was sufficient description of the occupation of the attesting witness.

CASE on appeal from the county court of Middlesex, holden at Brompton.

Goods having been taken in execution in the above action, a claim was made to them under a bill of sale by which the defendant had assigned the goods to the claimant to secure repayment of 280*l*.

An interpleader summons was taken out, and at the hearing the bona fides of the bill of sale was established.

In the affidavit of the execution of the bill of sale the maker was described as “government clerk,” and the attesting witness as “insurance clerk.”

Shaw, the maker of the bill, in cross-examination, stated that he was a clerk in the Admiralty; but no evidence was adduced as to the occupation of the attesting witness as an insurance clerk.

Objection was taken on behalf of the execution creditor to the validity of the bill of sale, on the ground that “government clerk” and “insurance clerk” were not a sufficient description of the occupation of the maker of the bill of sale and of the attesting witness respectively.

The deputy judge held the objection to the description of the occupation of the maker of the bill of sale was valid, and on that ground gave judgment for the execution creditor, without deciding upon the second objection.

The question for the Court was, whether the description “government clerk” was or was not a sufficient description of the occupation of the maker of the bill of sale.

Chapman, for the appellant, the claimant under the bill of sale, contended that the description of the maker of the bill of sale as "government clerk" was accurate, as he was a clerk in the Admiralty, which is a government office; and it was sufficiently specific within all the cases: it shewed what his occupation and position in life were. He cited *Allen v. Thompson* (1); *Gugen v. Sampson* (2); *Briggs v. Boss* (3); *Hewer v. Cox* (4); *Routh v. Roublot*. (5)

Sills, for the respondent, the execution creditor, contended that the description ought to shew what government office the maker was in. He referred to *Attenborough v. Thompson* (6); *Blackwell v. England*. (7)

Chapman was not heard in reply.

BLACKBURN, J. The description of "government clerk" was perfectly accurate, and quite sufficient to give the necessary information. So, I may add, though the case does not raise that point for our decision, the description of the witness as "insurance clerk" is *primâ facie* sufficient; it lies on those who say it is not to shew that the witness was not what he is described.

MELLOR and LUSH, JJ., concurred.

Judgment for the claimant.

Attorneys for execution creditor: *Dod & Longstaffe*.

Attorney for claimant: *W. Maynard*.

(1) 1 H. & N. 15; 25 L. J. (Ex.) 249. (5) 1 E. & E. 850; 28 L. J. (Q.B.)

(2) 4 F. & F. 974. 240.

(3) Law Rep. 3 Q. B. 268. (6) 2 H. & N. 559; 27 L. J. (Ex.) 23.

(4) 3 E. & E. 428; 30 L. J. (Q.B.) (7) 8 E. & B. 541; 27 L. J. (Q.B.)

73. 6 June 1857 124. 4 June 1857

(6) 5 June 1857

1872

June 10.

JONES AND ANOTHER v. THE NEPTUNE MARINE INSURANCE COMPANY.

Marine Insurance—Construction of Policy on Freight—“From B. Island to Port of Discharge, the Insurance on said Freight beginning from the loading of said Vessel.”

9QB452.

The plaintiffs caused themselves to be insured with the defendants, “lost or not lost, in 500l., upon the freight payable to them in respect of this present voyage to be performed by the vessel *Napier* from Baker’s Island to a port of discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel. Being a reinsurance to be paid as on original policy.” The plaintiffs had underwritten a policy on chartered freight of a cargo of guano, from Baker’s Island, while there, and thence to a port in England. The vessel arrived at Baker’s Island, and had taken in two-thirds of her cargo, a full cargo being ready, when she was wrecked. The plaintiffs, having paid upon a total loss, sought to recover it from defendants:—

Held, that the risk had not attached.

By Blackburn J., on the ground that the clause, “the insurance on the said freight beginning from the loading of the said vessel,” did not extend the insurance beyond the other part, “from Baker’s Island,” but only shewed that defendants did not intend to be liable unless the goods were on board.

By Mellor and Lush, JJ., on the ground, that the later words did extend the previous clause and made the risk begin earlier, but that “from the loading” meant from the completion of the loading.

DECLARATION on a policy of insurance of the 21st of February, 1871, effected by plaintiffs’ agents with defendants. The material parts of the policy were: That the agents, for themselves and all concerned, had caused themselves to be insured with defendants, “lost or not lost, in the sum of 500l. upon the freight payable to him or them in respect of this present voyage to be performed between as below, by the vessel *Napier* from Baker’s Island to a port of call ^{and} or discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel, and terminating when the said vessel shall be moored as above at a safe anchorage. . . . The said freight for the purposes of this insurance is hereby declared to be valued at the actual amount payable to the insured by the charterer of the vessel for the above voyage.” The perils were the usual perils; and in the margin was “Being a reinsurance to pay as may be paid on original

policy." (1) That certain goods at Baker's Island were loaded on board the said ship to be carried therein for freight, and other goods were there and then ready to be shipped, and would have been loaded but for the loss after-mentioned, and afterwards and during the continuance of the risk the ship by perils insured against became lost and rendered incapable of conveying the said goods upon the said voyage, whereby the freight was wholly lost, and plaintiffs were obliged and did pay the 500*l.* on the original policy: allegations of all conditions precedent. Claim, 500*l.*

Pleas: 1. That the policy was not effected as alleged. 2. That at the time of the alleged loss the ship had not been loaded within the meaning of the policy, nor had the insurance on the freight begun as alleged.

Issue joined.

At the trial, before Blackburn, J., at the Liverpool Winter Assizes, 1871, it was proved that a charter of the 22nd of August, 1870, was entered into between Wolf & Co., owners of the ship *Napier*, now on her passage to Melbourne, and the American Guano Company, by which it was agreed that the vessel should proceed on a voyage from the port of Melbourne, Australia, to Baker's Island, in the Pacific Ocean, and there load a cargo of guano. The charterers agreed to supply a full cargo of guano; and the owners agreed that when the vessel was properly loaded the captain should give bills of lading stating the quantity loaded, and then the vessel should proceed on her return passage to Birkenhead; and the charterers agreed to pay freight at 70*s.* per ton, each ton properly discharged and delivered, one quarter in cash within five days after arrival at her port of discharge, and the balance in cash upon the proper delivery of the cargo as per charter. . . .

The plaintiffs had underwritten a policy "in 500*l.* lost or not lost, at and from Melbourne to Baker's Island, while there, and thence to Liverpool or Birkenhead, upon any goods on board the vessel *Napier*," declared to be on "chartered freight valued at 6000*l.*" The plaintiffs having underwritten this policy caused themselves to be reinsured with the defendants by the policy of

1872

JONES
v.
NEPTUNE
MARINE
INSURANCE CO.

(1) The policy was partly printed and partly in writing: see the judgment of Blackburn, J., post, p. 707.

1872
JONES
v.
NEPTUNE
MARINE
INSURANCE CO.

the 21st of February, 1871, in the terms set out in the declaration.

The ship reached Baker's Island on the 1st of April, 1871, and had taken in about two-thirds of her cargo of guano, a full cargo being ready, when she was obliged through stress of weather to leave her moorings, the anchorage being in an open roadstead; and she afterwards struck on a reef and became a total wreck. The plaintiffs having paid 500*l.* on their policy, sought to recover it from the defendants.

A verdict passed for the plaintiffs for the whole amount claimed, with leave to the defendants to move to enter the verdict for them, or to reduce the verdict.

A rule was accordingly obtained to enter a verdict for defendants, on the ground that the risk had not attached; or to reduce the verdict to 250*l.*, or such other sum as the Court shall think fit, on the ground that the defendants were only liable to a loss in proportion to the freight on cargo actually loaded.

Butt, Q.C., and *Trevelyan*, shewed cause. The risk under the defendants' policy had attached. The first clause, "500*l.* on freight payable on the voyage to be performed by the ship *Napier* from Baker's Island to a port of discharge in the United Kingdom," is only a description of the subject insured, viz., chartered freight on the above voyage; and the risk is defined by the subsequent clause, "the insurance beginning from the loading of the said vessel." Insurance, being a contract of indemnity, is always to be construed in favour of the assured, as most consonant with the intention of the parties: 1 Duer on Insurance, p. 161. And, as on an insurance on freight all that is generally necessary is that the ship should be on the voyage, and the goods ready at the port for shipping: Phillips on Insurance, ss. 944-5, the words "the insurance beginning from the loading" must be interpreted to mean, that in order that the insurance may attach the loading must have commenced; and, inasmuch as the ship was partly loaded and the rest of the cargo was ready, the plaintiffs are entitled to recover the full amount. [They referred to *Foley v. United Fire Insurance Co.* (1); *Beckett v. West of England Marine Insurance*

Co. (1); *Mellish v. Allnutt* (2); *Richards v. Marine Insurance Co.* (3); *Hunter v. Leathley.* (4)]

1872

[BLACKBURN, J., referred to *Bell v. Hobson.* (5)]

Manisty, Q.C., and *Aspinall, Q.C.* (*R. G. Williams* with them), in support of the rule. All the cases cited are distinguishable. The insurance is of a voyage "from Baker's Island," and not "at and from," as is usually inserted in insurances on freight; the word "at" was omitted on purpose to avoid the danger of the open roadstead at Baker's Island. Inasmuch, therefore, as the insurance is only "from" Baker's Island, the words "the insurance beginning from the loading of the vessel," which more specifically define the point of time at which the risk is to commence, must mean the completion of the loading. Moreover the expression is "the loading of the vessel," not "of the goods;" and a vessel cannot be said to be "loaded" until the loading is complete. Therefore, as the vessel was only partly loaded the policy had not attached, and the rule must be absolute to enter a verdict for the defendants.

JONES
v.
NEPTUNE
MARINE
INSURANCE Co.

BLACKBURN, J. We are all agreed that the rule must be absolute to enter a verdict for the defendants; but, I believe, we are not quite agreed upon our reasons. I will proceed to state the reasons which induce me to come to the conclusion I do. This is a reinsurance on chartered freight; the original voyage of the ship was from Melbourne to Baker's Island, and thence to the port of discharge in the United Kingdom. There was of course in the charter the ordinary covenant to furnish a full cargo, and the freight was to be paid according to what was the quantity of cargo delivered at the end of the voyage, more or less according to the goods delivered. The ship sailed on this voyage, and she was insured from Melbourne to Baker's Island, during her stay there, and thence to a port in the United Kingdom. It was during her stay at Baker's Island that the disaster occurred. The underwriters on the original policy got the defendants to execute a reinsurance, on which latter policy the present question arises.

(1) 25 L. T. (N.S.) 739.

(3) 3 Johns. U. S. Rep. 307.

(2) 2 M. & S. 106.

(4) 10 B. & C. 858.

(5) 16 East, 240.

1872

JONES
v.
NEPTUNE
MARINE
INSURANCE Co.

The object of the reinsurance was of course to cover a portion of the risk which the plaintiffs had undertaken, and the question is what portion of the risk have the defendants undertaken by the policy which they have entered into?

The policy is a peculiar policy. It is not one of the ordinary Lombard Street, or Lloyd's policies, which have been modified of late; but it is an entirely new form of policy from beginning to end, and is applicable to freight only. That being so, we must consider what the ordinary policy of insurance is. In every case where there is an insurance against a marine loss, the undertaking of the underwriter is, I will be responsible for such accidents as happen to the subject-matter of the insurance during some particular voyage, which is described in the policy. The question here is what is that voyage? An ordinary Lombard Street policy is a very inartificial document, it is very old and long established, and it has acquired a meaning, which it was very difficult to put on it at first, but which has now been long established; and it is in a form that is made applicable in the first instance to goods, merchandise, tackle of ship, &c., it then mentions the voyage, and then come the further words, "beginning the adventure upon the said goods and merchandise from the loading thereof on board the said ship;" and then there is a blank, which is generally filled up with the words "at as above, and shall continue and endure until," and so on. And then is inserted the value, and sometimes the real subject-matter of insurance, as here chartered freight. In that form of policy nothing whatever is said, but the voyage is always understood to refer to the time when the risk is to commence on the freight; and the consequence of that construction of the policy is, that the underwriters are to be responsible, if the insurance be on goods, only when they are loaded on board the ship at the place named; if the insurance be on the ship, then from the time the voyage begins; though this depends upon how the policy may have been filled up; but as to the freight, where nothing is specified, the construction put upon the policy, as I understand it, is this: if the freight be in existence, as by the goods being ready to be loaded at the port named, and a peril happens which destroys the ship during the period of the specific voyage over which the policy is intended to apply, then

the underwriters are responsible for the loss of freight, although the goods be not put on board; it is enough to prove it to have been in existence, and that it does not rest in mere expectancy and possibility. Taking that to be the view of the matter, the question we have to decide on this policy is, in the first place, what is the voyage during which the underwriters undertook to be responsible for any damage arising to this freight from perils insured against; and, secondly, we have to see at what period of it the freight would be in such a state and condition that if the peril happens the freight is capable of sustaining damage from it. The policy is worded in this peculiar way: It begins thus, the insured "cause themselves to be insured in the sum of 500*l*. on the freight payable to him or them in respect of the present voyage to be performed," that being printed (1); then comes in writing, "by the vessel *Napier*, from Baker's Island to any port of call ^{and} discharge in the United Kingdom." Then come printed words again, "the insurance on the said freight beginning from the loading of the said vessel, and terminating when the said vessel shall be moored as above at a safe anchorage." Construing that as best I can, I think it amounts to this: the underwriters say, "we will be responsible for any damage in consequence of any peril that may happen during the voyage from Baker's Island to a port of discharge in the United Kingdom;" but I look in vain for words in that part of the policy which say, "or during her stay at Baker's Island." These words might easily have been inserted had the parties intended to undertake that risk; but they are not there. The argument that most struck me for the plaintiffs was, that the printed words which are intended to apply to all cases are, "the insurance on the said freight beginning from the loading of the said vessel," &c., and of course the goods were intended to be loaded before the voyage began, because they could not be loaded during the voyage from Baker's Island to the United Kingdom. If I understand Mr. Butt's argument, it comes to this, the printed words shew the risk was to commence earlier than the voyage described by the written words, that is, it was to commence during the vessel's stay at Baker's Island, as soon as goods were loaded; and that would raise the other question as to the

1872

JONES
v.
NEPTUNE
MARINE
INSURANCE CO.

Butt 70

(1) The original policy was handed to the Court.

1872
JONES
v.
NEPTUNE
MARINE
INSURANCE CO.

amount, whether it meant the whole or a partial loading. That being the argument for the plaintiffs, can any effect be given to it? I come to the conclusion that that is not the true construction of this policy. I think it means, instead of leaving it at large, so as to leave it open to say that the freight existed, the goods being ready though not loaded,—“we will be responsible for any peril that happens during the voyage described, but we will not be responsible for the freight and insurance upon it unless the goods are actually on board.” I take it the printed words are not an extension of the risk backwards so as to make it commence before the voyage begins, but are a general limitation of the insurance as to all freight, “we will not be responsible unless the goods are on board.” That is the view I take: “We will be responsible for damage to the freight, if the goods be put on board, during the voyage from Baker’s Island to the United Kingdom.” The loss in the present case happened before the voyage from Baker’s Island to the United Kingdom had commenced; and in the above view it is not covered by the policy, and consequently the defendants are entitled to the verdict. In this view it becomes unnecessary to express any decided opinion upon what was much argued, on the supposition that the printed words implied that the freight should be covered during some part, at all events, of the ship’s stay at Baker’s Island, whether or not it was necessary that the ship should be completely loaded before the risk attached. My present impression, without saying more, is, that, inasmuch as the freight payable would depend on the quantity of goods ultimately delivered, if a portion of the cargo had been shipped there would have been a portion only of freight at risk, the other portion would not be covered; and consequently the amount of insurance would be apportionable. I do not decide the point; but only express my present impression on that question. The ground I decide upon is, that I think the words of this policy express the intention of the underwriters not to be liable for perils that happen before the voyage from Baker’s Island to the United Kingdom had commenced.

MELLOR, J. I have come to the same result as my Brother Blackburn, although I differ in some respect from the view he

takes, and this I do with the greatest possible hesitation; but I cannot quite yield to all the reasons he has given. This is a re-insurance of a part of a risk; and the words are, not “at and from Baker’s Island,” but “from Baker’s Island to a port of call or discharge in the United Kingdom; the insurance on the said freight beginning from the loading of the said vessel, and terminating when the said vessel shall be moored at safe anchorage.” I cannot but think the written words—there being no “at” but only “from”—if they stood alone, would have the meaning my Brother Blackburn ascribes to them: they would only cover the risk from the time of the sailing of the vessel from Baker’s Island to the United Kingdom. But then follow words to which I cannot give any meaning satisfactory to myself unless by saying they extend the risk further “backwards,” as my Brother Blackburn expressed it. The printed words are, “the insurance on the said freight beginning from the loading of the said vessel.” Those words would not, I think, be satisfied by applying them to the state in which the loading was, so as to make the whole insurance begin when there had been a partial loading of the vessel; but I cannot but think they do extend the risk so far as to make it commence on the completion of the loading of the vessel; and this, as it appears to me, is not inconsistent with the words, “from Baker’s Island to a port of the United Kingdom.” And the policy must be read as if it had been “from the loading of the vessel at Baker’s Island to the United Kingdom.” That is the view I take of the policy, which, as I have said, I express with the greatest deference for the opinion of my Brother Blackburn.

1872

JONES
v.
NEPTUNE
MARINE
INSURANCE Co.

LUSH, J. I am also of opinion that the verdict ought to be for the defendants; but I arrive at that conclusion for reasons different from those which my Brother Blackburn has expressed; and, although that difference is not material in this case, yet it may be material in other proceedings on the same form of policy. In my view, the words descriptive of the voyage were not intended to define the risk. They are, “lost or not lost, in the sum of 500*l.* upon the freight payable to him or them in respect of the present voyage to be performed as below, by the vessel *Napier*, from Baker’s Island to a port of call ^{and} _{or} discharge in the

1872
JONES
v.
NEPTUNE
MARINE
INSURANCE Co.

United Kingdom." Those words, in my view, are descriptive of the subject of insurance, namely, the freight which is to be earned on the voyage described, and are not intended to define when the risk was to commence. Nevertheless, if there had been no other words defining the period when the risk was to commence, the risk, by implication, would only commence when the voyage commenced, and until the vessel had sailed on that voyage the policy would not have attached. Then come the words which are expressly put in to define the commencement of the risk, which had not, in my view, been defined before; and they are, "the insurance on the said freight beginning from the loading of the said vessel." I can only read those words as qualifying or rebutting the inference which would have been drawn from the previous description of the voyage, and as making the underwriters liable from the time when the vessel is loaded: that is, that they would be liable although the voyage had not commenced, if the vessel had been loaded. Then what does that loading mean? Does it mean at the commencement or the completion of the loading? In the present case the loading had been partially accomplished, not completed; the vessel perished before the cargo was all put on board. If those words mean the insurance beginning from the commencement of the loading, then, in my view, the plaintiffs would be entitled to the whole amount, because there would have been a total loss; for although all the cargo was not on board, all the cargo necessary to complete the loading was ready to be put on board, and would have been put on board had not the vessel been rendered unable to receive it by one of the perils insured against. If the words had been "beginning the insurance from the commencement of the loading," then the plaintiffs would have been entitled to the full amount they claim. But I am of opinion that the words "from the loading of the vessel" do not mean that. I take into account that the underwriters, *prima facie*, do not intend to be responsible for the freight during the time the vessel lay at Baker's Island, because the ordinary words are omitted. The words are, not "at and from Baker's Island," but "from Baker's Island." Therefore the underwriters intended not to incur that liability which is ordinarily incurred in policies of this description, "at and from," but only to insure the voyage; and the printed words, in my view,

must be read so as to qualify as little as possible the previous description of the voyage. Then, to what extent do they qualify it? According to my view, the only reasonable construction is that the defendants, in insuring that voyage, in effect say, "We are willing to become responsible from the time the vessel is loaded, that is, has taken in her full cargo and is ready to commence the voyage, although it shall not in fact have commenced." That reading appears to me to make the whole of the policy consistent; and, inasmuch as in this case the loading was not complete, the policy had not attached, and the plaintiffs can recover nothing. This disposes of the second branch of the rule, which was to reduce the verdict to the proportion due under the policy on the cargo actually put on board. It seems to me that the plaintiffs, on this policy, are entitled to all or nothing; and for the reasons I have given I think they are entitled to nothing, on the ground that the policy had not attached.

1872

JONES
v.
NEPTUNE
MARINE
INSURANCE CO.

Rule absolute to enter a verdict for the defendants.

Attorney for plaintiffs: *Wynne, for Forshaw & Hawkins, Liverpool.*

Attorneys for defendants: *Cunliffe & Beaumont, for Woodburn & Pemberton, Liverpool.*

THREFALL v. BORWICK.

June 14.

Innkeeper, Lien of, on Goods belonging to third Person—What Goods subject to the Lien.

B. went to defendant's hotel and took with him, as his own, a pianoforte which he had hired of plaintiff. B. having remained at the hotel several weeks left in debt for his board and lodging; and defendant claimed to detain the piano as against plaintiff in exercise of his lien as innkeeper:—

Held, that, as defendant had received the piano as part of the goods of his guest, he had a lien upon it.

Approved in L.C. 42 10 Q.B. 210
DECLARATION for detaining a pianoforte of plaintiff.

First plea, not guilty; and, inter alia, third plea, that defendant was an innkeeper, and kept a common inn for the reception of travellers and others. That defendant had a lien upon the piano

1872
 THREFAILL
 v.
 BORWICK.

for money payable by one Butcher to defendant for lodging and entertainment for himself and his wife and sister, and that Butcher, being then lawfully possessed of the piano, brought it to the inn with him, and defendant detained it in exercise of his lien as innkeeper.

Issue joined; and replication to the third plea, that the piano was let on hire to Butcher by plaintiff for a certain time which had elapsed before the detention by defendant, and the piano was not goods which a traveller ordinarily travels with, and defendant was not bound by law to take it in, and plaintiff never authorized Butcher to pledge it or create any lien upon it.

Issue joined.

At the trial, at Lancaster Spring Assizes, 1872, before Lush, J., it appeared that the defendant kept the Ferry Hotel, on Lake Windermere, and that one Butcher came there with his wife and sister in April, 1871. In addition to board and lodging, Butcher had a private sitting-room, for which he paid 16s. a week. Butcher brought with him a pianoforte, which defendant thought was Butcher's own, but which he had in fact only hired of the plaintiff. This was put in the private sitting-room. After several weeks, Butcher left the hotel in defendant's debt for board, &c., 45*l.*; and, on demand by the plaintiff, the defendant claimed to detain the piano in exercise of his lien as innkeeper for the debt due by Butcher.

A verdict passed for defendant, with leave to move to enter it for plaintiff for twenty-two guineas.

A rule was obtained accordingly, on the ground that the defendant had no lien upon the plaintiff's piano.

Holker, Q.C., shewed cause. The true relation of the defendant and Butcher was that of landlord and tenant; and the defendant was therefore justified in refusing to allow the piano to be removed; for this detention amounted to a distress: *Cramer v. Mott*. (1) But assuming the relation to have been that of innkeeper and guest, the defendant had a right to detain the piano, which he had received supposing it to be Butcher's own, in exercise of his innkeeper's lien. There are several cases, of which *Snead v.*

(1) Law Rep. 5 Q. B. 357.

Watkins (1) is the latest, that the lien extends to the goods of a third person brought to the inn by the guest as his own. *Broadwood v. Granara* (2) will be cited contra, but there the innkeeper knew the piano was not the property of the guest.

John Edwards, in support of the rule. The defence of distress cannot be set up without an amendment, which the Court will not now allow; but, moreover, the guest is not turned into a lodger by mere length of stay at the inn: see the judgment of Erle, C.J., in *Allen v. Smith*. (3) The innkeeper's lien is only co-extensive with his liability to receive; and only extends to such things as the innkeeper is bound to receive with his guest, viz., such things as a traveller usually brings with him: see the dicta and judgment of Parke, B., in *Broadwood v. Granara* (2); and where it is expressly said that a piano was not such an article. In *Turrill v. Crawley* (4) it was held that an innkeeper, having received the carriage of a guest, as here, although belonging to another, had a lien upon it for house room; and Coleridge, J., points out that the modern mode of travelling put a carriage in the same position as a horse, viz., that the innkeeper was bound to receive it and find accommodation for it, as being the usual accompaniment of a traveller; but this cannot be said of a pianoforte.

[LUSH, J. Assume the defendant was not bound to receive it, he did in fact take it in, why should he not have a lien upon it, if he has become an insurer of it, as belonging to his guest?]

MELLOR, J. The rule must be discharged. It is not necessary to say anything as to the amendment of the pleadings, because we are all of opinion that the plaintiff's counsel has failed to shew that the limits of the innkeeper's liability on the one hand, and of his privilege on the other, are such as he sought to establish. Whether or not the innkeeper would have been liable, if an indictment had been brought against him, for not receiving this guest and his goods, having accommodation for them, it is unnecessary to consider; when, having accommodation, he has received the guest with his goods and thereby has become liable

(1) 1 C. B. (N.S.) 267; 26 L. J. (C.P.) 57.

(3) 12 C. B. (N.S.) 638; 31 L. J. (C.P.) 306.

(2) 10 Ex. 417; 24 L. J. (Ex.) 1.

(4) 13 Q. B. 197; 18 L. J. (Q.B.) 155.

John H. S. 19

1872

THREFAILL
v.
BORWICK.

for their safe custody, it would be hard if he was not to have a lien upon them. And under such circumstances the lien must be held to extend to goods which he might possibly have refused to receive. In *Turrill v. Crawley* (1), the case which was most relied upon for the narrower view, Coleridge, J., says, we must give effect to the changing usages of society, and in noticing the distinction attempted between carriages and horses, he says the fact that most of the decisions are with respect to horses is "obviously explainable by reference to the mode of travelling in former times. New usages have grown up; and, as carriages are commonly used in travelling, the innkeeper's duties and privileges are extended to them." That, therefore, is no authority against the defendant; and the decision was that though the guest was not the true owner of the carriage, that made no difference, if the innkeeper did not know it. In *Broadwood v. Granara* (2), the innkeeper knew that the piano did not belong to the guest, and did not receive it as part of the guest's goods; and on that ground alone the innkeeper was held not entitled to a lien; although there are some dicta, not necessary to the decision, to the effect that the innkeeper was not bound to receive the piano. Possibly not, though the liability may well be extended according to the extended usages of society; but, whether the defendant was bound to receive the piano or not, he did receive it as the goods of the guest, and so became liable for it, and therefore must be entitled to his lien. The rule must, therefore, be discharged.

LUSH, J. I am of the same opinion. The innkeeper's lien is not restricted to such things as a travelling guest brings with him in journeying; the contrary has been laid down long ago. It extends to all goods which the guest brings with him, and the innkeeper receives as his. This is laid down in *Calye's Case* (3), at least as to the innkeeper's liability, and his lien must be co-extensive. If he has this lien as against the guest, the cases have established beyond all doubt that he has the same right as against the real owner of the article, if it has been brought to the inn by the guest as owner.

(1) 13 Q. B. 197; 18 L. J. (Q.B.) 155.

(2) 10 Ex. 417; 24 L. J. (Ex.) 1.

(3) 8 Rep. 32 a.

See H. 189.

QUAIN, J. I am of the same opinion. There is no authority for the proposition that the lien of the innkeeper only extends to goods which a traveller may be ordinarily expected to bring with him. In the fifth resolution in *Calve's Case* (1), the expression in the writ of *bona et catalla* is shewn to be extended by the subsequent words, *ita quod hospitibus damnum non eveniat*; and although the words *bona et catalla* "do not of their proper nature extend to charters and evidences, &c., or obligations, or other deeds or specialities, being things in action, yet in this case it is expounded by the latter words to extend to them; for by them," that is, the loss of them, "great damages happen to the guest: and therefore if one brings a bag or chest, &c., of evidences into the inn, or obligations, deeds, or other specialities, and by default of the innkeeper they are taken away, the innkeeper shall answer for them." A chest of deeds is certainly not ordinary traveller's luggage, and there is, therefore, no pretence for saying that there is any rule which confines the liability of the innkeeper to such articles; and certainly we ought not to confine his correlative lien within narrower limits. The liability, as shewn by the old cases, extends to all things brought to the inn as the property of the guest and so received, even a chest of charters, or obligations: and why not a pianoforte? If, therefore, the innkeeper be liable for the loss, it seems to follow that he must also have a lien upon them. And if he has a lien upon them as against the guest, the two cases cited (and there are more) shew that if the thing be brought by the guest as owner, and the landlord takes it in thinking it is the guest's own, he has the same rights against the stranger, the real owner, as against the guest.

Rule discharged.

Attorneys for plaintiff: *Williamston, Hill, & Co., for Woodburne & Poole, Ulverston.*

Attorney for defendant: *John Scott, for Fisher, Windermere.*

(1) 8 Rep. at f. 33 a.

1872

THREFAILL
v.
BORWICK.

1872

May 31.

SMITH v. DARBY AND OTHERS.

Grant of Mines, Construction of—Right to let down Surface.

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Declaration for mining under the plaintiff's land without leaving proper support, whereby the foundations of plaintiff's mill and other buildings gave way, and the buildings fell. Plea, that S., the plaintiff's predecessor in title, was seised in fee of the said land, &c., and of the subjacent mines, and by an indenture of lease between S. and certain persons as lessees, S. demised for thirty-eight years, from the 25th of March, 1839, all the veins of minerals that should or might at any time be found or discovered under the said land, with full power to the lessees and assigns to get the minerals from the old pits, and sink fresh pits, they, the lessees and assigns, making reasonable satisfaction to the lessor and his tenants for the damage done to them respectively by the surface of the lands being covered with rubbish or otherwise injured, or as he or they might sustain, as well by the injury done to the lands in sinking and getting the mines and minerals, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the lessor, by getting the minerals under or near to any of the dwelling-houses or other buildings according to the covenant thereafter contained for that purpose (to wit), in case any damage or injury during the term hereby granted shall happen to any of the dwelling-houses, cottages, or other buildings, already erected, or to be hereafter erected on the land in lieu of the present buildings, and not of greater value than the present buildings were when erected, by reason of any minerals being got under them, or so near to them as to occasion such damage or injury, the lessees and assigns shall at their own cost, on six days' notice by the lessor or assigns, or his tenants, rebuild or repair any such buildings so damaged and injured, and put them in as good condition and repair as they were before the damage was done. And further, that the lessees and assigns shall every year during the term pay to the lessor, besides the immediate damage to be paid to the tenant, at the rate of 40s. an acre for the damage done to the crops, &c., for the first five years, and such a price as arbitrators shall determine as rent for each acre that shall be damaged, after which the lessees shall have free use of the land during the residue of the term. The plea concluded with an allegation that the defendants became assignees of the lease, and were always ready and willing to perform the covenant. On demurrer:—

Held, that the plea was good: for that the terms of the lease were sufficient to shew by implication that it was intended that the lessees of the mines should have the right to work the mine so as to undermine the surface, subject only to paying damages according to the covenants.

FIRST COUNT: That plaintiff was possessed of certain land, and defendants wrongfully and negligently excavated and worked certain mines under and adjacent to the said land, and dug for and got and took away coals, minerals, and earth out of the said mines without leaving proper or sufficient support for the said land, and

thereby the said land gave way and sank, and the foundations of a certain mill and machinery, and the foundation of a certain cottage, and the foundations of other buildings erected on the said land and belonging to the plaintiff gave way and sank, and the walls of the said mill, cottage, and other buildings fell, and the said mill, machinery, cottage, and other buildings became prostrate and ruinous, and the said mill became broken and useless, and the plaintiff incurred great expenses in repairing the said mill, machinery, cottage, and buildings, and in endeavouring to maintain the same, and in repairing the said machinery, and also lost the use of the said land, mill, machinery, cottage, and buildings for a long time, and was unable to let the same, and the said land, mill, machinery, cottage, and buildings, have been for a long time and are now of no use or value to the plaintiff, and thereby also a certain stream of water which then flowed over the said land to the said mill, and was then used to supply water for working the same, was diverted from the said land, and the plaintiff has lost the use of the said water.

The second count was similar, alleging that plaintiff was possessed of certain land, and of a mill and a cottage and other buildings erected on it, and that there were certain foundations of and supporting the mill, cottage, and other buildings which plaintiff had of right enjoyed and ought to enjoy, &c.

The third count alleged that the plaintiff was entitled to have the said land, mill, cottage, and other buildings, and the said water supported by the soil, coal and minerals, under and adjacent to the said land, mill, cottage, and other buildings.

The fourth and fifth counts were similar to the first and third counts respectively, but alleged the possession to be in tenants and the reversion in plaintiff, and alleged damage to his reversion.

Third plea, to the first count, repeating the allegations in the tenth plea, and that the acts complained of were the lawful, proper, and reasonable getting by defendants of coals and minerals out of the mines in the usual customary and proper manner, and without any wrongful act or negligence on part of defendants.

Tenth plea, to first, second, and third counts, that, long before the committing of the grievances in those counts respectively men-

1872

 SMITH
v.
DARBY.

1872

SMITH
v.
DARBY.

tioned, and before the plaintiff became possessed of the said lands, mill, cottage, and other buildings (to wit), on the 25th of March, 1817, one R. Slaney, and one R. A. Slaney, were seised in fee of the land in those counts mentioned, and other land adjacent thereto, and of the mines under the same, being the mines in those counts respectively mentioned, and they, by indenture of the above date, and between them, as lessors, of the one part, and certain persons, as lessees of the other part, did demise and lease unto the said lessees, for the term of thirty-eight years, from the 25th of March, 1839,

All, and all manner of veins and seams of coal, ironstone, and other stone and minerals of any manner or sort whatsoever that should or might at any time after the expiration of a certain therein recited lease of the 1st of April, 1779, be found or discovered in or under the said land, in those counts respectively mentioned, with full power, liberty, and authority for the said lessees, their executors, administrators and assigns, and their agents, colliers, servants, and workmen, to get the coal, ironstone, and other stone, and other minerals, out of all pits already sunk or open, and like power, liberty, and authority for them, him, or her, to bore, dig, delve, and sink as many other pits as they should think necessary, and also to erect gins and engines, and to drive and make soughs, levels, and drains, or to amend and repair all such soughs, levels, and drains so to be made, and to amend and repair all such soughs, levels, and drains as were already made, which were out of repair and wanted amendment, and as often as the same should be out of repair and want amendment, and to do and cause to be done everything else that might be necessary and needful for the discovering and getting the said coals, ironstone, and other stone, and other minerals, and to place, stack, and lay such coal, ironstone, and other stone and minerals, and the rubbish and earth, by raising, digging for, and getting the said coals, ironstone, and minerals upon the enclosed lands, or waste lands, of the said lessors, from out of or under which the mines and minerals thereby demised should be gotten, and full liberty, power, and authority for the said lessees, their executors, administrators, and assigns, to sell, use, and consume the said coal, ironstone, and other stone and minerals, and to convert the said coal, or such part thereof as they should think proper, into charcoal, they, the said lessees, their executors, administrators, and assigns, from and after the expiration of the said lease of the 1st of April, 1779, making reasonable satisfaction to the said lessors, their heirs and assigns, and their tenant and tenants, for the damage done to them respectively by the surface of their land being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said lessors, by getting mines of coal, ironstone, or other stone, or other minerals, under or near to any of the dwelling-houses or other buildings of the said lessors, according to the covenant thereafter contained for that purpose.

Which said covenant was and is in the words following :—

1872

SMITH
v.
DARBY.

And, further, in case any damage or injury during the term hereby granted shall happen to any of the dwelling-houses, cottages, or other buildings already erected, or to any dwelling-houses, cottages, or buildings, to be hereafter erected on the estate of the lessors, in the parish of Dawley aforesaid, in lieu and stead of any of the present erections or buildings, and not of greater value than the present buildings were when erected, by reason of any coals, ironstone, or other minerals, being got under them or any of them, or so near to them or any of them as to occasion such injury or damage, that then the said lessees, their executors, administrators, and assigns, shall and will at their own costs and charges, on six days' notice to them given by the lessors, or assigns, or their tenants, rebuild, repair, and find materials, and carriage of materials, for the building and repairing any such messuages, cottages, and other buildings so damaged and injured by the means aforesaid, and put and make such messuages, cottages, and other buildings, in as good state, condition, and repair, as they were before such injury or damage was done or happened to them respectively. And, further, that they the said lessees, their executors, administrators, and assigns, shall and will yearly and every year on the 25th of March in each year during the term hereby granted, well and truly pay or cause to be paid unto the said lessors and assigns, over and besides the immediate damage or injury occasioned to the stock or crops of the tenant or occupier of the lands so to be damaged (which is to be paid for to the said tenant or occupier) a satisfaction for all damages and trespasses which shall be by them sustained, or which hereafter shall be done or committed by the said lessees, their executors, administrators, and assigns, agents, workmen, carriers, or colliers, by getting the said mines and minerals, after the rate of 40s. per acre per annum for and during the first five years from the commencement of such damage, and so in proportion for any greater or less quantity than an acre. And from and after the expiration of the said term of five years from the commencement of such damage shall and will well and truly pay or cause to be paid to the said lessors or assigns, such a price or value for the land so to be damaged as aforesaid as shall be fixed thereon by two indifferent persons, one to be chosen by each party, and in case such two persons shall not agree, then such a price as shall be fixed by such one person as the two persons so to be appointed as aforesaid shall name as their umpire, whose determination shall be final, the value of each acre of the said land prior to such damage done being reckoned by the arbitrators or umpire at 60*l.* per acre; and on payment of such sum as such arbitrators or their umpire shall so fix together with interest thereon, after the rate of 5*l.* per cent. per annum, after the expiration of the said term of five years, (when the said damage rent of 40s. per acre is wholly to cease), to the time of the actual payment of the said estimated damage, the said lessees shall have the free use, possession, and enjoyment of the land which shall be so damaged for the then residue of the said term of thirty-eight years or other further term to be granted as hereinafter mentioned, without paying any further consideration for the same by way of rent or otherwise howsoever.

And afterwards, and during the existence of the said term, all the estate and interest of the said lessees became vested in the defendants; and after the granting of the said term, and subject

1872

SMITH
v.
DARBY.

thereto, the plaintiff became possessed of the said land, mill, cottage, and other buildings in the said counts mentioned, and the defendants lawfully and properly worked the said mines under and according to the terms of the said indenture. That the damage or injury to the said land, mill, cottage, and other buildings of the plaintiff in the said counts respectively mentioned, happened and accrued by reason of the defendants so working the said mines, and not otherwise; and at the time of the doing of the said acts by the defendants, and of the accruing of the said damage, they always were, and thence hitherto have been, ready and willing to perform the said covenant on their part and to have the amount of compensation to which the plaintiff might be entitled settled as by the said indenture provided, and to pay the same, as the plaintiff well knew.

Eleventh plea, to the fourth and fifth counts, that after the granting of the said term, and subject thereto, the reversion in the land, mill, cottage, and other buildings, became vested in the plaintiff, and, except as aforesaid, repeating tenth plea.

Second replication to the third, tenth, and eleventh pleas, that divers of the said mill, cottage, and buildings in such counts mentioned are buildings erected since the making of the said lease, and were not erected in lieu or instead of any buildings erected on the said land at the time of the making of the said lease.

Third replication to the third, tenth, and eleventh pleas, that the damage to which the pleas are pleaded arose and accrued in consequence and by reason of the defendants, after the erection of the said mill, machinery, cottage, and buildings, having excavated, gotten, and removed the said minerals under and near to the said lands without leaving proper and sufficient support in that behalf, and the said damage would not have happened or accrued if the defendants had left reasonable and proper support for the land.

Demurrers to the third, tenth, and eleventh pleas, on the ground, amongst others, that the alleged lease upon which they were based does not expressly or impliedly deprive the plaintiff of the right to have his land supported, and the covenants merely give a cumulative remedy.

Demurrers to the second and third replications, on the ground,

amongst others, that the defendants were authorized by the lease to work the minerals without leaving support to the land and buildings.

1872

SMITH
v.
DANEY

Dowdeswell, Q.C. (G. Shaw with him), for the plaintiff. Nothing is better settled than that, when the surface and mines are in different owners, *primâ facie* the owner of the surface is entitled to the support of the subjacent strata; and it lies on the owner of the mines to shew in derogation of this right a right granted to him of taking all the minerals without reference to the surface: *Harris v. Ryding* (1); *Humphries v. Brogden* (2); *Smart v. Morton* (3); *Roberts v. Haines* (4); *Dugdale v. Robertson* (5); and most of those cases are instances in which the grant of the right to dig the minerals subject to paying compensation to the owner of the surface for injury to it, with a covenant by the mine-owner to pay the compensation, was held insufficient to override the *primâ facie* right of the owner of the surface to support, and an action was held to lie notwithstanding by him. In *Harris v. Ryding* (1), Parke, B., expressly says that such clauses give a cumulative remedy, and do not interfere with the common law remedy; see also per Williams, J., in *Berkley v. Shafte*. (6) In *Rowbotham v. Wilson* (7), no doubt, it was held that the clause giving the power to dig and take the minerals was wide enough to override the *primâ facie* right of the owner of the surface; but there there was an express covenant by the owners of the surface that the minerals might be worked by the grantees, without being liable to any action for damage by reason of the sinking of the surface from such working. Here the covenant is, not to pay damages, but to rebuild, which is no substitute for the common law right to damages. It is simply a positive covenant to pay certain damages in certain events, but there is no negation of the other rights of the owner of the soil. The second replication as to the injury being to houses newly built is good, for the owner of the surface is entitled to damages for the destruction of his houses,

(1) 5 M. & W. 60.

(4) 6 E. & B. 643; 25 L. J. (Q.B.)

(2) 12 Q. B. 730; 20 L. J. (Q.B.) 10.

353; 7 E. & B. 625. *29 L.J. 1872, 267 886*

(3) 5 E. & B. 30; 24 L. J. (Q.B.)

(5) 3 K. & J. 695; *31 L.J. 115, 67*260. *1 per H.S. 85*

(6) 15 C. B. (N.S.) 79, 92.

(7) 3 H. L. C. 343; 30 L. J. (Q.B.) 49. *8 per H.S. 465*

1872

SMITH
v.
DARBY.

notwithstanding they are modern, if the additional weight of them was not the cause of the subsidence: *Stroyan v. Knowles*. (1)

Bosanquet, for the defendants. The decision and the judgment of Lord Wensleydale in *Rowbotham v. Wilson* (2) are directly in favour of the defendants. The grant and covenants taken together shew, by necessary implication, that the parties intended an absolute grant of all the mines and minerals, subject only to the payment of compensation limited and to be ascertained in the mode prescribed by the covenant; the plaintiff's remedy, if any, is therefore on the covenant. *Smart v. Morton* (3) is the strongest case in favour of the plaintiff; but the terms of the present grant and covenant by the lessees are much larger than any in that case.

Dowdeswell, Q.C., in reply, pointed out that in *Rowbotham v. Wilson* the words construed to be an absolute grant were the words of the grantor; and he relied on the judgment of Parke, B., in *Harris v. Ryding*. (4)

116 BD 139 BLACKBURN, J. I think that judgment must be for the defendants. There is no doubt about the rights of the grantee of minerals, and they cannot be more accurately stated than by Lord Wensleydale in *Rowbotham v. Wilson* (5): "There is no doubt that, *primâ facie*, the owner of the surface is entitled to the surface itself and all below it, *ex jure naturæ*; and those who claim the property in the minerals below or any interest in them must do so by some grant from or conveyance by him, or, it may be, from the Crown, as suggested by Lord Campbell in the case of *Humphries v. Brogden*. (6) The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Primâ facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. It is one of the cases put by Sheppard (*Touchstone*, 5 chap. p. 89) in illustration of the maxim 'Quando aliquid conceditur, conceditur etiam et id sine quo

(1) 6 H. & N. 454; 30 L. J. (Ex.) 102.

(2) 8 H. L. C. 348, 360; 30 L. J. (Q.B.) 49.

(3) 5 E. & B. 30; 24 L. J. (Q.B.) 260.

(4) 5 M. & W. at p. 72.

(5) 8 H. L. C. at p. 360.

(6) 12 Q. B. 739; 20 L. J. (Q.B.) 10.

res ipsa non esse potuit,' that by the grant of mines is granted the power to dig them. A similar presumption, *primâ facie*, arises that the owner of mines is not to injure the owner of the soil above by getting them, if it can be avoided. But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired, and then the only question would be as to the construction of that deed, which may vary in each case." In that particular case there were difficulties under an Inclosure Act, and other points were raised. But the point which Lord Wensleydale said was sufficient to decide the matter was this: Pears, through whom the plaintiff claimed, had executed a deed, and whether he was the owner of the surface at the time or not, subsequently, at all events, the title accrued to him; and Lord Wensleydale says that the covenant in the deed would, by estoppel, be operative as a grant to take the minerals absolutely. The covenant was one in which the different parties who had taken the surface and the minerals very clearly expressed their intention that the minerals might be taken without making compensation for the surface sinking; and Lord Wensleydale says, "Pears would still be bound by the deed which he executed, which would operate as a grant of the right to win the coals in such a manner as might injure the superjacent land." (1) That case, being in the House of Lords, is binding upon us. *Primâ facie*, it is to be taken, that where the minerals are granted the grantee is to take them in such a way as to leave sufficient support; but the question comes to be whether it sufficiently appears, upon the present deed, what the parties intended. It appears that, when this grant was made, there were houses and buildings on part of the land, and on part there were no houses and buildings. By the deed was granted, in general terms, full liberty to enter, and work, and take the minerals, with this important clause: "they, the lessees, their executors, administrators, and assigns, making reasonable satisfaction to the lessors, their heirs and assigns, and their tenant and tenants, for the damage done to them respectively by the surface of their lands being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said

1872

 SMITH
v.
DARBY.

 (1) 8 H. L. C. at p. 364. *6 Jan 1896*

1872

SMITH
v.
DARBY.

mines and minerals and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said lessors by getting mines of coal, ironstone, or other stone or other minerals under or near to any of the dwelling-houses or other buildings of the said lessors, according to the covenant thereafter contained." I quite agree with Mr. Dowdeswell that, *primâ facie*, what would be meant by a deed which grants the ores and minerals would be a grant to take them, but leaving sufficient support for the surface. But does not this deed say, "You may take them absolutely, only making compensation afterwards?" I cannot agree that there is any argument to be derived from the use of affirmative words only, without any negative words. The question is what was the intention of the parties to the deed, when there is an affirmative promise to pay money to the tenants, and what was the bargain as to the sale of the property. If the owner of a horse said, "You may take the horse," and the person to whom this was said had promised to give 20*l.* for it, there is no question that he could not be sued in an action of trespass for taking the horse, because the intention of the parties was that the one was to buy and the other sell the horse. So here the question is whether it appears upon the clauses in the deed that the intention of the parties was that the minerals should go absolutely, without any restriction as to the right of support; and if it appears that compensation must be paid for that in a particular way, it shews that the intention was that they should be so taken. I think it does here sufficiently appear that there was such an intention. The words I have already read go as far as this: They contemplate the getting the minerals under the houses, paying for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the lessors by getting the minerals under or near any of them. That, *primâ facie*, would mean: "You must pay compensation for taking the minerals under the houses and not leaving sufficient support." Then the covenant carries this still further. [The learned judge read the covenant.] On payment of the compensation awarded, the lessees are to have "the free use, possession, and enjoyment of the land which shall be so damaged for the then residue of the term." Taking these things together, it seems to me to be plain that the

bargain of the parties was this: "You, the grantees, shall have the minerals, not, as is usually the case, to win them, leaving, as you would be, *primâ facie*, supposed to do, sufficient support for the surface; but you shall have them absolutely, without being obliged to leave the support, and if you do any damage by bringing down the surface, you shall pay for taking away the minerals without leaving support, in the way we afterwards provide," and the fact of the grantees affirmatively promising to make compensation to the grantors seems to say on the grantor's part, "We have sold you the right of support." This seems to me, therefore, as complete and good a bargain and sale as that of the horse; and it follows that the plaintiff has no other remedy than that given him by the covenant. Consequently the pleas are good, and the replications bad.

MELLOR, J. I am of the same opinion. The Messrs. Slaney were the owners both of the surface and of the mines. By the lease they separated the surface from the mines, giving a power to the lessees to work the mines, in the fullest manner that such a power can be given. But I agree that, if there had been nothing else in the instrument to negative the presumption, it would have been open to the suggestion that the grant must be subject to the right of support to the surface; which is always presumed, unless an intention to the contrary appears, either expressly or by necessary implication. There is no doubt that the power conferred to work the mines in any manner and to get all the coal is very extensive. And the compensation for the damage, which it was contemplated by the parties might arise from the working, is to be made according to the covenant contained in the deed for that purpose; and in order to construe the grant and to ascertain whether or not the right of support was incident to it, or whether the intention was to dispense with it, we must look to the covenant, construing that and the grant together. I cannot but think that the intention of the parties may be thus expressed: "I grant you the absolute right to get all the coals, but certain damage may result; houses may be let down or damaged, and so on; in case such damage arises you must restore or repair the houses, and in case you have to substitute one building for another you shall not

1872

SMITH

v.
DARBY.

1872

SMITH
v.
DARBY.

be required to substitute one of greater value than the value of the one at present on the premises." The parties had under their consideration the extent and nature of the injury for which they intended that the grantee of the mine should compensate. And the language, I think, shews an intention on the part of the lessor and the lessee to limit the damages as expressed in that covenant; and I think it would be a very great hardship on a lessee who thought he had guarded against being open to indefinite damages, if he should be liable to be told, "You have not done that; that is only a cumulative provision, you are still liable for any damage you may do, just as much as if you had entered into no such covenant." The case that most weighed upon my mind was *Smart v. Morton* (1); but it appears clear from the expressions used in *Rowbotham v. Wilson* (2), that the parties are not limited to particular stipulations. The man who grants the minerals and reserves the surface is entitled to make any bargain that he likes; both parties are just as much at liberty to make a bargain with reference to coals and minerals, as to make a bargain with reference to anything else. And when I find a bargain, as it appears to me, expressing the intention of the parties, it gets rid of all the difficulties which were very forcibly and ingeniously urged. I agree entirely in the judgment which my Brother Blackburn has pronounced, and must say that the pleas are good, and that the replications are bad.

LUSH, J. I am of the same opinion. I take it to be well established by the cases that a grant of all the minerals under certain lands, without more, must be read, not as meaning a grant of all the minerals that may be found under those lands, but of all the minerals that can be taken away from under those lands without disturbing the surface. And if to that grant be superadded provisions for compensation for damage done to the surface, if the words giving compensation can be fairly satisfied by reference to acts done on the surface, though they may be large enough to extend to damage done to the surface by taking away the support, still they must be read as confined to acts done on the surface, the pre-

(1) 5 E. & B. 30; 24 L. J. (Q.B.) 260.

(2) 8 H. L. C. 348; 30 L. J. (Q.B.) 49.

19 Jan 25 25
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sumption being that the grantor did not intend to enable the grantee of the minerals to take away the support from the surface soil. Now if the words of this lease contained only phrases of that description capable of being satisfied by reference to acts done on the surface, I should agree with Mr. Dowdeswell that they did not confer power on the lessees to take away the minerals without leaving support under the surface soil. But the words are not capable of being so read; you cannot satisfy the terms of the grant without imputing to the grantor an intention to enable the grantee to take away all the minerals he may find there, though the effect of the working may be to let down the surface land. The words of the grant are in general and very extensive terms. [The learned judge read the grant]. Then comes the condition, "They, the said lessees, making reasonable satisfaction to the said lessors and their tenants for the damage done to them respectively, by the surface of their land being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal" . . . Had it stopped there I should have agreed with Mr. Dowdeswell that all those terms might have been satisfied by referring to injuries done on the surface,—sinking pits on the surface, or bringing rubbish upon the surface. But they are large enough to be applied to damage done to the surface by mining operations underneath. In what sense they are used is to be ascertained, I think, by the words which follow; "As well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said lessors, by getting mines of coal, ironstone, or other stone or other minerals, under or near to any of the dwelling-houses or other buildings of the said lessors according to the covenant hereinafter contained for that purpose." Here, therefore, is contemplated injury to dwelling-houses and other buildings on the surface by mining operations. That cannot mean injured by any acts done on the surface; it must mean from mining operations below. That is more clearly shewn when you come to the covenant for compensation. [The learned judge read

1872

SMITH
v.
DARBY.

1872

SMITH
v.
DAREY.

the covenant.] It clearly appears from that covenant that the parties contemplated that the mining operations authorized by the lease might result in injury to the surface and to the buildings upon it, even to their destruction. That gives a meaning to the words of the grant which I have already read, and shews that the parties had in their contemplation that the surface soil might be greatly disturbed by the mining operations which it was intended should be carried on by virtue of the lease. This is further confirmed by the provisions by which the lessees are bound to a certain extent to make compensation. Therefore, I think, taking the whole of the deed together, it is clearly shewn that the intention of the parties was that the lessees should take away all the minerals they found, even though the effect might be to injure the surface, only making such compensation as was therein provided.

Judgment for the defendants.

Attorney for plaintiff: *A. J. Holmes.*

Attorney for defendants: *W. Potts, for Potts & Son, Broseley.*

June 5.

HOLT v. THE GAS LIGHT AND COKE COMPANY.

*Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 38-50—"Value of Lands purchased, and Compensation for Injury to Lands held therewith"—
"By severing or otherwise injuriously affecting."*

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The plaintiffs, a volunteer corps, had obtained leases of pieces of ground, on which they had formed a rifle range of 800 yards, and had built butts. Immediately behind the butts was marsh land in the occupation of A., and beyond that some marsh meadows. In order to provide for the safe passage of bullets passing beyond the butts, the plaintiffs had obtained a lease of the meadows; but as to A.'s land, they had only a verbal agreement, under which they paid A. 49l. per annum as an agreed commuted payment or compensation for any injury done to the cattle on the land in the course of shooting at the butts, and it was open to either party to discontinue the arrangement at any time on giving a proper notice. The defendants, a gas company, under their Act, were empowered to take compulsorily part of the meadows leased to plaintiffs for the formation of a road to defendants' works, and the formation and use of this road rendered it impossible to use the rifle range, and it was accordingly abandoned by plaintiffs. Proceedings were taken under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 38-50, before a jury, to assess the compensation to plaintiffs for the land taken by defendants, and for the severance or otherwise injuriously affecting

the other land of the plaintiffs; under the latter head they claimed compensation for the stoppage of the rifle range. The jury, under s. 49, assessed compensation under both heads. The defendants disputed their liability to pay the latter sum, on the ground that there had been no actual severance of the land taken from the rifle range, by reason of the plaintiffs having only a precarious interest over A.'s land :—

1872

HOLT
v.GAS LIGHT
AND COKE CO.

Held, that the plaintiffs were entitled to this head of compensation; and that the fact that plaintiffs had only a precarious right of shooting over A.'s land only went to the quantum of compensation which the jury might think right to award.

CASE stated by consent, without pleadings.

The action was brought to recover 2800*l.* compensation awarded by a jury under the Lands Clauses Consolidation Act, 1845.

The following is the substance of the case :—

The plaintiff is the commanding officer of the Tower Hamlets Rifle Volunteer Brigade within the Volunteer Act, 1863, and is admitted to be the proper person to receive the compensation on behalf of the brigade, if recoverable.

On the 15th of May, 1869, the brigade had acquired and were in occupation of certain lands situate near Plaistow, in the county of Essex, these lands being used by them as a rifle range.

By an indenture of the 1st of December, 1860, between James Simmons and three trustees for the corps, a piece of marsh land at Plaistow, containing about ten and a half acres, was demised by Simmons to the trustees for a term of twenty-one years from the 29th of September, 1860.

By another indenture of the 28th of February, 1861, between William Blake and the trustees, another piece of marsh land at Plaistow, containing about fourteen acres, adjoining the first-mentioned land, was demised by Blake to the trustees for a term of twenty-one years from the 25th of December, 1860.

Upon the lands so demised two permanent butts for the purpose of rifle shooting—the one of brick, the other of iron—were erected by the corps at a considerable expense, giving a firing range at each target up to 800 yards on the demised land. The targets were about 100 yards laterally apart, the demised land being at that end about 250 yards wide, and gradually tapering to about forty yards wide at the extreme firing point.

The range was duly inspected, certified, and authorized, and was

1872 thenceforward and until the 15th day of May, 1869, regularly and
 HOLT continually used by the brigade and by other volunteer corps, their
 v. lessees, for the purpose of rifle shooting, except during a short time
 GAS LIGHT in the years 1864 and 1865, when they were restrained by the
 AND COKE] Co. injunction hereinafter mentioned.

The land in the rear of and beyond the butts, for a distance of upwards of 1000 yards, was flat open marsh land, unbuilt upon, and used almost entirely for the feeding of cattle, and the corps never had or acquired any rights in or over the same, except as hereby appears. In the year 1864 Mr. Edward Raphael, who was the owner of the land lying a little distance in the rear of the butts, complained that (as the fact was) the bullets which passed the butts reached his land, killed cattle grazing there, and rendered it dangerous to go upon it; and he thereupon filed a bill in Chancery to restrain the shooting at the butts. In July, 1864, he obtained an injunction accordingly; and thereupon an agreement was come to between the corps and him for his leasing to them the land in question. Accordingly, by an indenture of the 22nd of May, 1865, between Raphael and a trustee, the last-mentioned land, containing over 23 acres, was demised by Raphael to the trustee for a term of seventeen years, from the 29th of September, 1864. This lease was in full force at the time of the service of the notice to treat, and of the entry hereafter mentioned.

The brigade paid to the tenant or occupier of the land lying immediately behind the butts and between the land demised by Simmons and Blake respectively and the land demised by Raphael an annual sum of 49*l.*, as an agreed commuted payment or compensation for any injury done to the cattle on the land, by or in course of the shooting at the butts. The arrangement to make this payment was an annual arrangement, not reduced to writing, and it was open to either the tenant or the brigade to discontinue the arrangement at any time on giving a proper notice. The distance from the butts, across this land to Raphael's land, was about 240 yards; and the width of this land was about 300 yards.

The brigade used the range for the rifle practice of their members; but as the use of the range for this purpose was only required on certain days in the week, they let to other volunteer corps the right of shooting at one or both of the butts on the other days;

and from this rent they realized more than they themselves expended.

By the Gas Light and Coke Company's Act, 1868 (31 & 32 Vict. c. cvi.), the defendants were authorized to execute certain works, and to purchase and take, under the provisions of the Lands Clauses Consolidation Act, 1845, certain lands, among others a piece of land being nine and a half acres of the twenty-three acres rented by the brigade of Raphael, lying on the extreme left of, and occupying the whole length of Raphael's land, and being about 150 yards wide, and 300 in length. These nine and a half acres were for the purpose of making a private road. This road, when completed, will be the principal access to the gasworks of the defendants at Beckton, and was acquired by them for such purpose; it is, and is intended, to be kept and used as a private road.

In pursuance of the powers of their special Act, and of the Lands Clauses Consolidation Act, 1845, the defendants, on the 5th of October, 1868, caused to be served on the brigade a notice to treat for the above nine and a half acres of land; and afterwards the defendants took all necessary steps under s. 85 of the Lands Clauses Consolidation Act, 1845; and on the 15th of May, 1869, they gave a bond, and on the same day entered upon and took possession of the land. The colonel of the brigade, in anticipation of their so taking possession, of which he had notice, issued an order closing the range after the 5th of May, 1869, and the brigade from that day discontinued, and have never since resumed, the use of the range for rifle shooting.

Upon the 12th of April, 1870, the defendants duly issued their warrant to the sheriff of the county of Essex, pursuant to the Lands Clauses Consolidation Act, 1845, for summoning a special jury to ascertain, and determine by their verdict the amount of the purchase money and compensation payable by the defendants to the plaintiff. A jury was summoned, and the inquiry duly held accordingly.

Upon the hearing of the inquiry it was proved that, by reason of the construction of the road (which ran on the left of the rifle range, in a straight line, along the whole length of the rifle range, at an angle of about forty-five degrees with the range, but not touching any of the land occupied by the brigade until it cut into Raphael's

1872

HOLT

v.

GAS LIGHT
AND COKE CO.

1872 HOLT <i>v.</i> GAS LIGHT AND COKE CO.	land, crossing along the whole length of it) it became impossible for the brigade or their lessees to use the range. The piece of Raphael's land taken was a necessary and essential part of the road, without which it could not have been formed.
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The plaintiff, on behalf of the brigade, claimed compensation on the footing that, in addition to the purchase-money or compensation payable to him for or in respect of his interest in the lands taken, he was entitled to compensation for the damage sustained by the shutting up of the range for rifle practice, as being a damage sustained by him by reason of the severance of the land taken from the other lands held under the several demises aforesaid; and that in assessing such compensation the jury might and ought to take into account the value of the whole of the lands in which the plaintiff was interested, as a rifle range, as well for use by the brigade as for letting to other corps for the purposes of rifle shooting.

It was contended for the defendants that the brigade had no legal right or title to use the land demised to them for the purposes of firing at the butts at all, inasmuch as they had no right or easement in or over the land immediately in rear of the butts, and that that land was absolutely essential to a use of the butts; that at best they had a mere permissive user, revocable on any day without notice; that the taking of the land taken did not of itself prevent the use of the butts; that it was the formation of the road as a whole which rendered it impossible to fire on the range, inasmuch as bullets which did not lodge in the butts must pass over and render dangerous other parts of the road as well as the part constructed on the land taken; and that there was no such damage from severance as claimed.

The under-sheriff, in summing up to the jury, told them that it was doubtful whether there was any legal "severance" of the nine and a half acres from the rest of the lands occupied by the brigade; but he desired them to say how much they gave as the purchase-money of the plaintiff's interest in the nine and a half acres, and how much for the severance or otherwise injuriously affecting of the lands held therewith, that is, not only the rest of Raphael's land, but the other lands used by the brigade as a rifle range, taking them as a whole, from which the nine and a half acres

were cut off; and he pointed out to them that though the brigade had leases of the other land till 1881, they had a mere licence over the land in the immediate rear of the butts, which might possibly be revoked at any time, and in estimating the injury they must take this into consideration. The jury found a verdict, 300*l.* as the purchase-money and 2500*l.* compensation for severance.

The Court were to draw all such inferences of fact as a jury might properly draw.

The question for the opinion of the Court was, whether the plaintiff, as such commanding officer, is entitled to recover the sums found and assessed by the jury or either of them. (1)

June 4. *Horace Lloyd, Q.C. (R. E. Turner with him)*, for the plaintiff. The compensation to be awarded under s. 49 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18) (2), is not only for the value of the land purchased, but also for injury to land held therewith, that is, held by the same person, though not under the same title; and the jury are to give damages for the severance or otherwise injuriously affecting of the other lands by the exercise of the powers of the Act. In the present case the plaintiff's brigade held this piece of land which the defendants have taken with the other lands of which they have leases, for the sole purpose of their rifle range; and this purpose is entirely put an end to by the formation of the defendants' road under the powers of their Act. This is clearly, therefore, damage by severance, or "otherwise injuriously affecting." Not only are the

(1) There were also questions as to the plaintiff's right to interest and costs; but these were given up by the defendants' counsel.

(2) 8 Vict. c. 18, s. 49: "Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done, or to be done, to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein, belonging to the party with

whom the question of disputed compensation shall have arisen, or which, under the provisions herein contained, he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith."

1872

HOLT

v.

GAS LIGHT
AND COKE CO.

1872 plaintiffs deprived of the range for their own use, but also of the
 HOLT rent they would get from other corps. It will be said that over
 v. part of the range the plaintiffs have only a revocable licence to
 GAS LIGHT shoot, but this only goes to the quantum of damages; this was
 AND COKE Co. pointed out to the jury, and they might well think that a licence
 under an annual payment of 49*l.* for merely keeping the land
 vacant of cattle during the hours of the rifle practice was not likely
 to be revoked. At all events, the Court cannot look at the amount
 of compensation, if any compensation is due under that head.

June 5. *Philbrick (Hawkins, Q.C., with him)*, for the defendants.
 No doubt the land held under the same lease with that taken is
 injuriously affected to some degree by the severance of the land
 taken. But although "land held therewith," in s. 49, is not to be
 confined to land held under the same title, still there can be no
 severance unless the land taken and the other land be physically
 connected, which is not the case here. The plaintiff's corps has,
 say, a twelve years' interest in the 800 yards, and in the meadows,
 part of which is taken by the defendants, under the respective
 leases. But the value of this twelve years' interest as a rifle range
 was completely destroyed by the precarious nature of the licence
 which they had over the land immediately in the rear of the butts.
 The corps, therefore, had no rifle range which could be injured by
 the severance, or otherwise. They had no such interest in the
 land in the rear of the butts as could be the subject of compensa-
 tion: *Bird v. Great Eastern Ry. Co.* (1) If that is so, then there
 could be no severance, and no compensation for severance could be
 awarded by the jury, except so far as the other land held of Raphael.
 But the jury have given compensation in respect of the whole rifle
 range.

Horace Lloyd, Q.C., was not called upon to reply.

COCKBURN, C.J. We are all of opinion that judgment ought to
 be for the plaintiff. If ss. 22, 38, and 49 of the Lands Clauses
 Act are referred to, it will be seen that the legislature, in giving
 powers to companies to take land compulsorily, contemplates the
 giving of compensation in two cases, the one for land actually

(1) 19 C. B. (N.S.) 268; 34 L. J. (C.P.) 366. *11 June 45. 782*

taken, the other for damage to the land held at the same time with the land taken, by reason of the severance, or by reason of the land not taken being injuriously affected by the execution of the undertaking. In the present case land has been taken by the company, and the land so taken was held at the same time and for a common purpose, and was connected with the land which has been left. It is true that between the land taken and the land left there is an intervening space filled up by land not belonging to those who are now claiming compensation; but the lands thus separated from one another were connected together, and therefore I think the requirement of the statute, the condition on which compensation may be claimed—namely, that land held with the land taken is injuriously affected—is sufficiently satisfied. We have to consider, as it seems to me, only the question whether the land not taken has been injuriously affected by the taking of that which has been taken. I think that, when the facts are looked at, that is a proposition upon which there can be no doubt. The land which has been taken and that which has been left formed part of the rifle shooting range, and, as such, was useful and beneficial to the owners; and the simple fact is, that by taking the land which they have taken the company have rendered the possibility of using that which is left for the purpose of a rifle range impossible, and so have altogether depreciated the value of that which is left: because it was as a shooting range that its principal value accrued. Therefore the land which is left is injuriously affected by the taking of the land which has been taken. What matters it that between the two there intervenes a piece of land which does not belong to the parties claiming compensation, except this, that, inasmuch as their right to use that land as part of the range depended on the will or licence obtained from the owner of the land, it was precarious. But inasmuch as there was no reason to suppose he would alter his will in respect of it and change his mind, and give them notice that the licence or permission given should be withdrawn, I see no reason why the jury should not, looking at the whole state of things, come to the conclusion that substantially this was not of so precarious a tenure but that they might infer that the existing state of things would not be altered; and that that which had been used before as an entire rifle range

1872

HOLT

v.

GAS LIGHT
AND COKE CO.

1872

HOLT

v.

GAS LIGHT
AND COKE CO.

would have been so continued, and, consequently, that the land had a value which it would not have lost but for the intervention and act of the company; and, therefore, there should be some compensation for this loss. It was matter for the jury, and if they had been of opinion that this was so precarious a thing that no value could be attached to it, it would have been right to have found a verdict accordingly. But they have come to the opposite conclusion, and I cannot see that they were at all wrong in coming to that conclusion. Things would doubtless have remained exactly as they were but for the company; then the company come and take this land, and the consequence is that the other land, though separated from the land taken by the intervening field, has been sensibly and materially diminished in value. It is therefore injuriously affected. I see no reason why the corps should not be entitled to compensation for it, it being perfectly clear that, in point of fact, the company have done them a most serious injury by taking the land which they have taken, and thus destroyed the range. I think, therefore, judgment ought to be for the plaintiff.

BLACKBURN, J. I also think judgment should be for the plaintiff. I quite agree with Mr. Philbrick in this, that compensation could only be given where from the words of the statute there is sufficient to shew the intention of the legislature to give compensation; and the question, therefore, is, whether the Lands Clauses Consolidation Act does apply to such a case as this. Now the two sections which are material are the 49th and the 63rd. The 49th section enacts. [The learned judge read the section.] I think that section, taken by itself, did clearly express the intention of the legislature, that the jury should give damages for the taking of the land, and, also, if severed, for the injury to the other lands held therewith. I think those words, "the injury to the other lands held therewith," mean from the severing or otherwise injuriously affecting the lands by the exercise of the powers of the Act. The 63rd section corroborates this view. [The learned judge read the section.] The words used in the two sections are slightly different, but there can be no doubt at all that the legislature intended that the same measure of compensation should exist in the case of compensation assessed by arbitrators,

justices, or surveyors, and in the case of compensation assessed by a jury; and I think that they have clearly and plainly expressed this, and that when the land is taken and other land is held therewith, or, in the language of the other section, it is severed from the land which is taken, it means the same thing; and that when land is held therewith there is to be compensation not simply for the taking of the land, but for the injury to the other land or by the severance or otherwise injuriously affecting the other land; and the question really comes to be, whether in the present case it can be said that the lands which form the rifle range, from the shooting-point to the butts, are held "therewith," that is, with the lands taken beyond the butts, so as to be severed from those other lands. Now, as I understand, Mr. Philbrick's contention was that no lands can be held along with, so as to be held therewith or severed from the others in any sense, unless physically contiguous. I do not see anything in the wording of the Act to apply to that; nor do I see anything in the nature of the thing to require it. In the present case the land leased of Raphael, though not actually contiguous, is held for the very same purpose. The lease was expressly obtained because the other land in front of the butts could not be used for a rifle range without it; and it was for that reason required for the very purpose of enabling the other land to be used as a rifle range; and Raphael's land was occupied not by the same title, but occupied by the same occupier, or the same parties, for the same common object. I think, therefore, in every sense of the word, it was held "therewith." I do not inquire precisely whether the word "severed" distinctly applies—whether this would or would not be properly and strictly called "severance," because I am of opinion that the words "severed or injuriously affected" quite apply to such a case as this. In the case of *Duke of Buccleuch v. Metropolitan Board of Works* (1) there was great difference of opinion as to the application of those words, the minority of the Exchequer Chamber thinking them applicable in a way which I certainly thought they were not. The House of Lords (2) has since said that the duke was entitled to recover the larger measure of compensation. The exact reasons I do not know. Certainly there is

1872

HOLT
v.
GAS LIGHT
AND COKE Co.

20CLD4

(1) Law Rep. 5 Ex. 221.

(2) Law Rep. 5 H. L. 418.

1872
HOLT
v.
GAS LIGHT
AND COKE CO.

not anything less favourable to the present claimant than there was in that case. In the Exchequer Chamber I expressed the opinion (which will be found in Law Rep. 5 Ex. at p. 242) that the words "otherwise injuriously affected," extended to anything analogous,—to injuries which, though they do not arise strictly from severance, yet are ejusdem generis, and so near it. Taking that view of the matter, which I am by no means inclined to depart from, I think the piece of land held of Raphael was certainly held, with the land in front of the targets, for the very purpose of enabling it to be used as a rifle range; and when I find the effect of the cutting off and depriving the plaintiff of part of it is completely to stop the use of the rifle range, I think, to say the least, that is an "injuriously affecting" so much ejusdem generis with severance as to be included in those general words, and therefore the plaintiff ought to be entitled to recover. An objection was taken, that the owner of the land immediately in the rear of the targets, that is, of the land between the targets and Raphael's land, might, if he had pleased, have withdrawn the licence, certainly at the end of a year, perhaps at a day's pleasure, and so stopped the firing over the range altogether: that no doubt does go to the quantum of damage, and shews that the right as to actual enjoyment was precarious; and consequently the jury ought to take into account, in giving a verdict and damages, the possibility that the owner of the land might wish to apply his land to another purpose, or wishing to make an extortionate rent from the rifle range, might withdraw his licence. I cannot see, however, when the two are occupied together for a common purpose, and the possession of both is essential for that purpose, why any person who has lost the benefit of the part taken away should not be compensated; and, as I have said, the words of the Act are quite wide enough to cover it, the damage not exactly arising from severance, but even if not, at all events so much ejusdem generis as to come within the general words which follow.

MELLOR, J. I am of the same opinion. The claimants in this case, for the express purpose of establishing a rifle range, acquired various pieces of land, in which they have different interests and different estates; but for the purpose of the rifle range it was essential, not only that they should have all the land in front of

the targets and Raphael's land, but that they should also acquire the right, or the power at all events, of shooting over the piece of land immediately in rear of the targets; they accordingly did acquire that power, but they acquired it by licence only from the tenant, who gave them the power to shoot, and they paid him a commuted sum in respect of any damage which might possibly arise from injury to his cattle. The taking away any portion of the land in which they had acquired an interest, whether for a long or a short term, necessarily affected the range; and in this case the company did take a portion of Raphael's land for the purposes of the Act under their compulsory powers. But on what terms did they take it? If the Act had allowed them to take it, and provided no compensation for any injury other than with regard to the land taken, of course no complaint could be made. But the Act did not proceed upon that principle; it proceeds upon the principle that a man holding land in a particular district or place, may receive injury in respect of other land held "therewith," that is, not necessarily under the same title. So that if land is to be taken, the statute makes it a condition not only to pay for the land taken, but to pay compensation for injuriously affecting the remaining lands. There is no doubt that here there was an injurious affection of the remaining lands, because as the one object of the corps had been to acquire the various interests which they did acquire for the purpose of the range, taking away one portion of the extremity of the land for the purpose of the gas company entirely destroyed any power of using the whole as a range. It would be very strange indeed if such a case were not within the statute. Mr. Philbrick has had the opportunity of looking into the cases, and has brought forward none that are inconsistent with the view we take, which is obviously founded on just and sensible reasons. Therefore, I am clearly of opinion that the claimants are entitled to the amount the jury assessed, as we have nothing to do with the quantum of damages.

LUSH, J. I am also of opinion that the land taken by the company was land held with the other lands within the meaning of the 49th section. Mr. Philbrick's argument amounts to this, that there cannot be a severance within the meaning of this clause

1872
HOLT
v.
GAS LIGHT
AND COKE CO.

1872
HOLT
v.
GAS LIGHT
AND COKE CO.

except in cases where the land taken is actually contiguous to the land left. Now, it appears to me that there is nothing whatever in the Act to suggest any such intention. There are many cases in which a factory consists of many detached buildings—a gunpowder factory, for instance, where every process must be, by law, carried on in a building standing at a distance from every other building. It seems monstrous to say that if one of the buildings necessary for the factory were taken there would be no severance, within the meaning of this clause, of that building from the rest. There is nothing, as I said before, in the language of the clause, which to my mind suggests that. I think it means lands connected together in use as regards the purpose to which they are applied by the owner. If in the case I have put one of such buildings is taken, the loss of that virtually depreciates the rest of the buildings for the purpose for which the owner has applied them, and that is a severance which entitles the owner to this class of damage. Here there happens to be a space between the land taken and the land left in which the plaintiff had no legal interest: but then he had a licence from the owner to make use of it for all the purposes which he required. What does it signify, the several pieces forming as respects their use one range, whether the party has a legal interest in the space which lies between them or not? The argument of Mr. Philbrick comes to this: It is true that the company have by the taking away of one depreciated the value of the rest; the answer is, they ought not to pay for that, because the same thing might have been done possibly by the owner of the intermediate piece; he might have stepped in at any time and deprived the corps of the licence; that would have had the same effect of destroying the range as taking this piece of land. But that is no answer on the part of the company to the legality of the claim; that only goes to the amount of damages.

Judgment for the plaintiff.

Attorneys for plaintiff: *J. & R. Gole.*

Attorneys for defendants: *Wyatt, Hoskins, & Hooker.*

THE QUEEN *v.* THE REGISTRAR OF FRIENDLY SOCIETIES.

1872

June 6.

Registration of Trade Union—Duty of Registrar where two Applications to register under the same Name—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 13—Regulations of Secretary of State.

By 34 & 35 Vict. c. 31, s. 6, any seven members of a trade union, by complying with the provisions of the Act as to registry, may register the union. By s. 13 (2) the registrar, upon being satisfied that the union has complied with the regulations as to registry in force under the Act, shall register the union; (3) no trade union shall be registered under a name identical with that under which any other existing trade union has been registered; (6) a secretary of state may from time to time make regulations respecting registry under this Act. The Home Secretary made regulations, (1) the registrar shall not register a trade union under a name identical with that of any other existing trade union known to him, whether registered or not; (2) upon application for the registration of a trade union already in operation, the registrar, if he has reason to believe that the applicants have not been duly authorized by the union, may, for the purposes of ascertaining the fact, require from the applicants such evidence as may seem necessary.

A trade union, which had been some years in operation, became divided into two sections, each section claiming to have the governing body among them. Both sections applied to register the trade union by the name which the society had always gone by. The registrar heard evidence voluntarily given by each party, and finding there was a *bonâ fide* dispute, refused to register the trade union under either application until the decision of a competent Court determined the legal status of the applicants. On rule for a mandamus, obtained by the parties first applying, to compel the registrar to register the union on their application:—

Held, that (irrespective of the regulations) the registrar was right, under the Act, in refusing to register, so as not to alter the position of the parties.

Semble, that the regulations were not *ultra vires*.

RULE calling upon A. K. Stephenson, Esq., the Registrar of Friendly Societies in England, to shew cause why a mandamus should not issue commanding him to register The Amalgamated Society of Carpenters and Joiners, meeting at East Temple Chambers, Whitefriars, London, as a trade union, upon the application, dated the 15th of April, 1872, of H. P. Colliver and six others, according to the provisions of the Trade Union Act, 1871, upon notice of the rule to be given to H. Thompson and another, of Manchester.

The Amalgamated Society of Carpenters and Joiners is a trade union which has been established some years, and had deposited

146D4

1872
THE QUEEN
v.
REGISTRAR
OF FRIENDLY
SOCIETIES.

the rules, but was not registered under the Friendly Societies Act, some of its rules being in restraint of trade.

The society was governed by a general council and an executive council, who worked harmoniously for several years; but in May, 1871, disputes having arisen between them before, a complete rupture took place. There then became two bodies, each claiming to govern the society—the executive council in London, supported by twenty branches of the society, and the general council at Manchester, to which the other 222 branches adhered.

After the passing of the Trade Union Act, 1871 (34 & 35 Vict. c. 31 (1)), both parties applied in August to the registrar to be registered; but both applications were refused, on the ground that

(1) By the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 6, any seven or more members of a trade union may, by subscribing their names to the rules of the union, and otherwise complying with the provisions of this Act with respect to registry, register such trade union under this Act; provided that if any of the purposes of such trade union be unlawful, such registration shall be void.

Sect. 13. With respect to the registry, under this Act, of a trade union, and of the rules thereof, the following provisions shall have effect:—

1. An application to register the trade union and printed copies of the rules, together with a list of the titles and names of the officers, shall be sent to the registrar under this Act. 2. The registrar, upon being satisfied that the trade union has complied with the regulations respecting registry in force under this Act, shall register such trade union and such rules. 3. No trade union shall be registered under a name identical with that by which any other existing trade union has been registered, or so nearly resembling such name as to be likely to deceive the members or the public. 4. When a trade union applying to be registered

has been in operation for more than a year before the date of such application, there shall be delivered to the registrar before the registry thereof a general statement of the receipts, funds, effects, and expenditure of such trade union, in the same form and shewing the same particulars as if it were the annual general statement required, as herein-after mentioned, to be transmitted annually to the registrar. 5. The registrar, upon registering such trade union, shall issue a certificate of registry, which certificate, unless proved to have been withdrawn or cancelled, shall be conclusive evidence that the regulations of this Act with respect to registry have been complied with. 6. One of Her Majesty's principal secretaries of state may from time to time make regulations respecting registry under this Act . . . and generally for carrying this Act into effect.

On the 8th of December, 1871, the Home Secretary made regulations, of which the following are two:—1. The registrar shall not register a trade union under a name identical with that of any other existing trade union known to him, whether registered or not registered, or so nearly resembling such name as to be likely to deceive the

the parties had not complied with the Act. Both parties renewed their application in December; and, after hearing them, the registrar refused to register either, giving his reasons in writing, which shew the facts and grounds upon which his decision was based, and of which the following are the material parts.

An application is before me, dated the 23rd of December, 1871, requiring me to register the Amalgamated Society of Carpenters and Joiners, as meeting at East Temple Chambers, Whitefriars Street, Fleet Street, London. This application (hereinafter called "the London application") is signed by H. P. Colliver and others, who state they are authorized to make it by a resolution passed by the executive council of the above-named society.

Another application is before me, dated the 30th of December, 1871, requiring me to register the Amalgamated Society of Carpenters and Joiners, as meeting at 53, Grosvenor Street, Chorlton-on-Medlock, Manchester. This application (hereinafter called "the Manchester application") is signed by John Thompson and six others, who state that they are authorized to make it by a vote of the whole of the members of the society, taken at meetings summoned for the purpose in the month of September, 1871, when 3821 votes were recorded in favour of registering the society, 125 members only voting against the proposal to register.

As both applications are to register a trade union under the same name, if one had been complied with the other must have been refused: see 34 & 35 Vict. c. 31, s. 13, subs. 3.

It appeared from the balance-sheets accompanying the respective applications, that both related to one and the same society, whose rules, as the rules of the Amalgamated Society of Carpenters and Joiners, had been deposited with me under s. 44 of the Friendly Societies Act (18 & 19 Vict. c. 63), previous to the passing of the Trade Union Act, 1871.

I therefore served notice on both applicants that on the 15th of January, 1872, I should be prepared to hear evidence for or against their respective applications.

Though I am authorized, by regulation 2 of the Secretary of State's Regulation of the 8th of December, 1871, to require from the applicants such evidence as may seem to me necessary, no power is given me by the Trade Union Act, 1871, to administer an oath, or to compel the production of any evidence; but I was willing and desirous to hear anything that either of the applicants for registration might be disposed voluntarily to lay before me, with the view of ascertaining whether I could satisfy myself as to the right of either party to obtain registration to the exclusion of the other, without requiring that right to be established by litigation; or of ascertaining whether by mutual consent their differences could be arranged, or whether the applicants could be registered under different names.

members or the public. 2. Upon an application for the registration of a trade union which is already in operation, the registrar, if he has reason to believe that the applicants have not

been duly authorized by such trade union to make the same, may, for the purpose of ascertaining the fact, require from the applicants such evidence as may seem to be necessary.

1872
THE QUEEN
v.
REGISTRAR
OF FRIENDLY
SOCIETIES.

1872

THE QUEEN
v.
REGISTRAR
OF FRIENDLY
SOCIETIES.

Both parties stated that they could not consent to take my decision, if adverse, as binding, and would reserve their rights to compel me by mandamus, or otherwise, to register upon their application, if I should refuse to do so.

Subject to this statement, each party tendered evidence which satisfied me that differences had occurred in the society, as it existed, under the rules deposited with me, previous to the passing of the Trade Union Act, which differences had led, on the 18th May, 1871, to a division of the society into two sections, which were represented by the applicants before me. It also appeared that the funds of the society in the possession of its various branches, as returned by the applicants in their respective balance-sheets, amounted on the 31st of December, 1870, to 17,568*l.* 19*s.* 4*d.* It also appeared that the books of the society, whose rules were, as above stated, deposited with me as registrar of friendly societies, were, and still are, in possession of the London applicants; but it was contended by the Manchester applicants that such possession was illegal.

It appeared, therefore, that the questions at issue were mixed questions of fact and law, depending on the application of the legal construction of the rules as deposited to disputed facts, and that such questions involve very large interests.

I am of opinion that, under the Trades Union Act, 1871, the duties of the registrar are ministerial, not judicial; that no power is either expressly or impliedly given to him by the Act to call for evidence either oral or documentary, or to administer an oath; and that the regulations made by the secretary of state cannot confer on the registrar any power which the Act does not give him.

Though the applicants have voluntarily given me information, they have declined to give me any authority beyond what the Act gives to the registrar.

I express no opinion on the merits of the case of either party; but decline to register the trade union under either application, unless directed by mandamus so to do, or until the decision of a competent Court determining the legal status of the applicants to my satisfaction has been obtained by one or other of them.

The London section on the 15th of April, 1872, again applied to the registrar for registration, who again refused on the ground that he had already refused the same application when made on the 23rd of December, 1871.

Upon which this rule was obtained.

The registrar did not appear.

H. James, Q.C. (Besley with him), shewed cause on behalf of the Manchester section. It is unnecessary to go into the merits, as it is conceded that there is a *bonâ fide* dispute between the two sections of the society. The registrar was perfectly justified in refusing to register, when there were two parties before him, each claiming to represent the same society. This is precisely a case contemplated by the first and second regulations of the secretary of state. It was contended when the rule was obtained that these regulations were *ultra vires*. That is not so. Sect. 13, subs. 3, forbids

the registration of a union under a name identical and similar to one already registered. That only applies to registered unions; but the regulations only carry this out. For otherwise, inasmuch as when one union has been registered under a given name no other could be registered under the same name, a well-established union might be deprived of its name when it afterwards applied to be registered. But, supposing the regulations to be ultra vires, the registrar was clearly justified under the Act in refusing to register under either application; for by registering either he might in effect give them an advantage, when it might turn out that they were not entitled in any way to represent the society.

[BLACKBURN, J. By registration they would *primâ facie* become entitled to the funds under s. 8.]

MacDonald, in support of the rule. Sects. 2 and 3 of the new Act only prevent a society, whose rules are in restraint of trade (as was held in the case of this very society in *Hornby v. Close* (1), and *Farrer v. Close* (2)), being illegal either in a criminal or civil sense; but it gives a trade union no standing in the Court of Chancery: and inasmuch as by s. 5, subs. 3, a trade union is not within the Companies Acts, and the deposit of the rules under the Friendly Societies Acts is rendered inoperative, a trade union, until after registration, can have no *locus standi* in a court of equity. Consequently, by refusing to register, the registrar has deprived the applicants of their only means of establishing their rights: *Pare v. Clegg*. (3) The registrar had no such discretion as he has claimed to exercise. By s. 13, subs. 2, he was bound to register these applicants on being satisfied that they had complied with the regulations of the Act. It is only under the regulations of the secretary of state that he can justify his refusal. But these regulations are ultra vires, as they do not carry out the provisions, but in effect enact fresh provisions.

[LUSH, J. Surely these regulations are within s. 13, subs. 6, "for the purpose of carrying the Act into effect."]

They impose conditions and limitations far beyond the enactments of the statute, and consequently so far are not binding.

(1) Law Rep. 2 Q. B. 153.

(2) Law Rep. 4 Q. B. 602.

(3) 29 Beav. 589; 30 L. J. (Ch.) 742.

1872

THE QUEEN
v.
REGISTRAR
OF FRIENDLY
SOCIETIES.

1872

THE QUEEN
v.
REGISTRAR
OF FRIENDLY
SOCIETIES.

14CD486

BLACKBURN, J. There can be no doubt that this rule must be discharged. It is a great mistake to affirm that there is any decision that trade unions, or societies of that kind are, as it were, outlaws, and out of the protection of the courts of law or equity; and all that this Court held was that where statutes give certain benefits to friendly societies, societies whose rules were in restraint of trade and illegal in that sense, could not claim the benefit of the statutes. However, s. 3 of the Trade Union Act, 1871 (34 & 35 Vict. c. 31) seems to put an end to all doubt as to the jurisdiction of the Court of Chancery, by enacting that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. What is the registrar called upon to do under this new Act? By s. 6 any seven or more members of a trade union may, by complying with the provisions of the Act with respect to registry, register the society, and call upon the registrar to give a certificate of registration. Sect. 13 points out what is requisite in order to register. The effect of registration is to give to the members all the benefits of the Act; and the object of this application, no doubt, is to attain this benefit for the applicants and enable them to appoint trustees, in whom by virtue of s. 8, all the funds of the society will become vested, and so enable the applicants to deal with these funds. The effect, therefore, of registering either section of the society by the name claimed by both, would be virtually to give that section the control of the large funds belonging to the society. What is the registrar to do when such a state of facts as the present is brought to his knowledge? It is quite clear that under the first rule made by the secretary of state, the registrar was justified in refusing to register either section; and neither section has or could comply with rule 2. I cannot see why these rules are not within the authority given to the secretary of state by clause 6 of s. 13. But even without these rules, I think the registrar, as soon as he found another body of persons *bonâ fide* claiming that they were entitled to be registered under the same name, and each claiming as against the other a large sum of money, would be bound to say, "I won't alter the position of the parties, or do anything, by registering one set of applicants, which may prejudice the others." I think, therefore,

under the circumstances, the registrar was quite right in refusing to register either. We cannot administer the funds in dispute; but I can see no reason why the parties should not be able to obtain relief and adjudication upon their rival claims in equity. All we decide now is that we will not compel the registrar to register the present applicants, because we think him right not to register, so as not to alter the position of the parties.

1872

THE QUEEN
v.
REGISTRAR
OF FRIENDLY
SOCIETIES.

MELLOR, J. I am of the same opinion. We should not be doing right if we compelled the registrar to prefer one of the contending parties to the other by registering them, when two sets of persons are shewn to be claiming to represent the same society. The Court of Chancery is more adapted to settle such a dispute; and as to its power in the present instance, ss. 2 and 3 of the new Act use words expressly for the purpose of removing all doubt as to the legality of a trade union, although its rules may be in restraint of trade.

LUSH, J. I am of the same opinion. I think that under the circumstances the registrar was perfectly right in refusing to register, when he knew there were two bodies each claiming to be registered as representing the same society. I think this, irrespective of the rules of the secretary of state; though I cannot bring myself to think that the rules are ultra vires; it certainly would be most reasonable that the registrar should have power to inquire into the matter, where he has reason to believe the applicants are not authorized by the trade union which they claim to represent.

Rule discharged.

Attorney for applicants: *A. Howard.*

Attorneys for opponents: *Shaen, Roscoe, & Massey.*

1872

June 15.

FOX v. CLARKE.

Conveyance of House—"House now in the Occupation of P."—Ornamental Frontage extending across adjoining House.

The plaintiff, having agreed to purchase two adjoining houses, agreed to sell one to P., and by plaintiff's direction that house was conveyed to P., (and by him to defendant) in fee, the description being, "all that dwelling-house now in the occupation of P." The houses were in a street, and were built up to the foot pavement. On the front of defendant's house, at the side which adjoined the plaintiff's, was a slight projection nine feet wide, in the middle of this was the doorway, three and a half feet wide, and on each side of the doorway was a pillar supporting a shallow portico; over the doorway was a window of the same width, and above that a pediment; all symmetrically placed on the nine-feet projection. Inside, the party-wall, dividing the two houses, instead of being coincident with the extremity of the nine-feet projection, was in a direct line with one side of the doorway, so that if the party-wall had been prolonged in a straight line to the street, two feet eleven inches of the width of the projection, which included part of the portico and of the pediment and the whole of one of the pillars supporting the portico, would have been on the plaintiff's side of that line; and on the inside, these two feet eleven inches, which, from the outside, appeared to be part of defendant's house, formed part of the wall of the front room of plaintiff's house. The defendant having painted the two pillars, the portico, and the whole of the pediment, which were stucco, plaintiff brought an action of trespass, claiming as his the one pillar, the part of the portico, and the part of the pediment over the pillar. On the above facts, the Court having power to draw inferences of fact:—

Held (by Blackburn and Mellor, JJ.; Lush, J., dissenting), that the disputed parts belonged to the plaintiff, and did not pass as part of the house in the occupation of P.

Noted in Ex. Ct. 40 Q.B. 565.

DECLARATION for trespass in painting parts of the walls of plaintiff's house.

Pleas, *inter alia*, 2nd, that the said house and the said parts of the said walls were not plaintiff's as alleged; 3rd, that the parts of the said walls were the freehold of defendant.

Issue joined.

At the trial, before Blackburn, J., at the last Suffolk Spring Assizes, it appeared that the plaintiff had become the purchaser in fee of two adjoining houses in Museum Street, Ipswich, and he had agreed to sell the southern house to R. M. Phipson; and by deed of the 13th of August, 1853, to which the plaintiff was a party, and which recited the plaintiff's agreement to purchase the two houses and his agreement to sell one to Phipson, the owners in fee, by direction of the plaintiff, conveyed to Phipson in fee "all that

messuage or dwelling-house, with the garden thereto belonging, situate in the parish of St. Matthew, in Ipswich, lately in the occupation of Miss Gooch, now in the occupation of the said R. M. Phipson, together with the walls belonging to the said messuage and premises, and the walls bounding or dividing the said garden, except nevertheless that the wall dividing the said messuage from the said messuage in the occupation of Robert Charles Burton, and retained by the said John Fox [the plaintiff] is to be considered a party-wall, and to be enjoyed by the said John Fox and the said R. M. Phipson, and their respective heirs and assigns, and their respective tenants accordingly, and also subject as to the wall dividing the said garden hereby conveyed from the premises so retained by Fox to the use of the same by Fox, his heirs and assigns, and his and their tenants, in common with Phipson, his heirs and assigns, and his and their tenants" and (after further describing the back premises) "which said messuage and dwelling-house, garden walls, passages, and hereditaments are by way of further identity laid down and delineated on the map or plan thereof drawn in the margin of these presents. Together with all and singular the houses, outhouses, edifices, buildings, yards, gardens, rights, ways, paths, passages, waters, watercourses, liberties, privileges, covenants, profits, and commodities and emoluments whatsoever to the said messuage or dwelling-house hereby granted, belonging, or appertaining, or in any way reputed to belong or appertain, or held, occupied, or enjoyed with or as part of, parcel or member of the same."

Phipson, by deed of the 2nd of January, 1866, reciting the above conveyance, conveyed the house and premises, &c., to defendant in fee.

The two houses formed part of a row of houses in the street of uniform elevation built quite up to the foot pavement, and on the front of defendant's house at the side which joined the plaintiff's house was a slight projection of two or three inches and nine feet in width. Symmetrically placed in the middle of this projection was the doorway, three feet and a half wide, and on each side of the doorway was a pillar supporting a shallow portico. Over the portico was a bedroom window of the same width as the doorway, and over the window was a pediment which extended a few inches

1872

 FOX
v.
CLARKE.

1872

 FOX
 v.
 CLARKE.

beyond each side of the projection, and under the window was a string course, which also extended the whole width of the projection. (1) On the inside, however, the party wall dividing the defendant's house from the plaintiff's house, instead of being coincident with the end of the projection, was about two feet eleven inches more to the south, being in fact in a direct line with the side of the doorway; so that from two to three feet of that, which appeared from the outside to form part of the defendant's house, from the inside formed part of the wall of the front room of the plaintiff's house. (2)

The plan attached to the conveyance to Phipson was a very small ground plan not drawn to scale. It shewed the bases of the two pillars, both of them being on the defendant's side of the line drawn to represent the party wall. The houses were of brick, but the pillars, pediment, &c., were of stucco.

The action was brought for painting the pillar and the parts of the portico over it and of the string course and of the pediment, all of which were to the north or plaintiff's side of the middle of the party wall, and all of which the plaintiff claimed as part of his house, while the defendant claimed them as part of the house in the occupation of Phipson.

The learned judge directed a verdict for the plaintiff on the second and third issues (the jury being discharged as to the others), with leave to move to enter the verdict on those issues for the defendant, if the Court, having liberty to draw inferences of fact, should be of opinion that on the evidence the defendant was entitled to the verdict.

A rule was obtained accordingly.

O'Malley, Q.C., and *Blofeld*, shewed cause. The parts in dispute are clearly the property of the plaintiff. They form parts of the outside walls of his house. It is true they form part of the architectural design of the row of houses, and for this purpose appear to belong to the defendant's house. But they are no part

(1) This appeared from a photograph which was put in. the above direction, and after this the defendant's house and premises widened

(2) This appeared from a plan put out some eight or nine feet behind and in: it also appeared that the party wall beyond the front rooms of the plaintiff's house. ran only fifteen feet from the front in

1872

 FOX
 v.
 CLARKE.

of the house "occupied" by Phipson, for neither he nor the defendant as occupier had any enjoyment of them; and there are no other words capable of passing them. The plan attached to the conveyance is erroneous, and cannot be relied on by either party, as the base of the pillar and the party-wall are relatively misplaced.

Manisty, Q.C., Bulwer, Q.C., and Graham, in support of the rule. The parts in question form parts of the defendant's house, and passed under the words in the conveyance of "the house now in the occupation of Phipson." True, there has been no actual—that is, physical—enjoyment of these parts; but that may be said of any of the outside ornaments of a house. They form part of the house, and if they are cut off the house is no longer the same house as that occupied by Phipson. The plan attached to the conveyance is in the defendant's favour; it shews the base of the column (and therefore all perpendicularly above it) to be part of the defendant's house; and as to the base of the column and the party-wall being relatively misplaced, that is only because the plan is drawn too favourably for the plaintiff by putting the party-wall too far out. If the parts in question do not belong to the defendant, there is nothing to prevent the plaintiff from defacing them in any way he pleases; indeed, he can knock the ornamental part off, and leave the defendant with a lop-sided pediment and a portico with only one pillar. At the least, these parts must be treated as a continuation of the party-wall, to be enjoyed by both.

BLACKBURN, J. Although we are not agreed, I do not think it a case in which any benefit could possibly be derived from taking time to consider, for the whole matter lies in a very small compass, and it is more a question of fact than of law. It appears that the plaintiff having contracted to purchase the two houses, which are built adjoining one another, the owners of the legal estate, by the plaintiff's direction, conveyed one of them to Mr. Phipson in fee. [The learned judge read the description of the house, including that as to the party-wall.] It is pretty clear, therefore, that what was conveyed to Phipson was all the house then in his occupation. We have no evidence as to what was the occupation of the premises before him. That question being left to the Court, who

1872
Fox
v.
CLARKE.

are to draw conclusions of fact, we have to decide what was conveyed. The conveyance expressly conveys the walls (though that was unnecessary, as a conveyance of a house of course includes the walls), except the wall dividing the two houses, which is to be enjoyed by the respective owners as a party-wall. But as to that there is no question; the question is, whether the external parts of the building which the plaintiff claims really belong to the plaintiff or defendant. The exact question which we have to decide is, what was the house that was occupied by Phipson at the time the conveyance to him was made. On that point we have but two pieces of evidence to look to. The first is the photograph. Any one looking at that would not fail to come to the conclusion that the defendant's house extended so far as to include the whole of the nine-feet projection. No one from the outside would doubt that the whole of the part inside the projection belonged to the defendant's house. But, in point of fact, two to three feet inside belong to the plaintiff's rooms, the middle line of the party-wall, which divides the plaintiff's house from the defendant's house, being about that distance from the outer edge of the projection on the plaintiff's side. So that when you come to look at the inside you find that from two to three feet of the wall, which any one looking from the outside would certainly say was part of the defendant's house, is in reality the wall which is built for the purpose of keeping out the wind and weather from the plaintiff's rooms inside. Therefore, I should say, *primâ facie*, that this would be part of the plaintiff's house, and not part of the defendant's house.

In answer to this, what is urged on the part of the defendant is, that part of the space which goes beyond the party-wall is occupied by a pillar which supports a portico, and that that pillar is so much intended to support the top of the portico that it may well be said that the pillar and this part of the portico are part of the defendant's house. If that were so, that would not carry a verdict for the defendant, for the defendant claims a considerable portion beyond this. But it is part of the defendant's house only in this sense, that any one looking at the outside would see that, for the purpose of general architectural effect, the front has been built so as to make it appear as if the defendant's house extended to the extreme edge of the projection. But this mere architectural ornament

is not a thing which the defendant would use more than any other person. It seems to me that the plaintiff would enjoy the architectural beauties of the street as much as the defendant; so would the neighbours. I think that these external ornaments were not conveyed. What was conveyed was what Mr. Phipson used and enjoyed, and I think that meant the house he lived in, all the interior he lived in, and as much of the exterior as was requisite to support and maintain that interior. I think the *primâ facie* rule to be taken when you are dividing one house from another, is to find what the interior is, and to say that what divides the interior should be prolonged in a straight line to the street, and, consequently, what stood on the plaintiff's side of this line would belong to the plaintiff. The conveyance was of "the house," and there is nothing whatever here to prevent the line being drawn in the ordinary way. The conveyance refers to a plan; and this plan represents the line which divides the houses as drawn out straight to the street in the ordinary way. If that were all that appeared on the plan, it would be in favour of the plaintiff; but the plan represents the square base of the pillar as coming on the defendant's side of the line, and so far represents the pillar and base as being the defendant's. But then it is quite clear that the portico and pillars are misplaced. What I base my judgment upon is this, that if the house occupied by Mr. Phipson meant those parts he used and enjoyed internally, with the external walls that protect them, then the parts of the adjoining house, the frontage walls which protect the plaintiff's house, did not pass or cease to be the plaintiff's merely because they are external ornaments apparently belonging to the defendant's house; they remain the plaintiff's as external parts of his house. I am therefore of opinion that the rule must be discharged.

1872

 Fox
 v.
 Clarke.

96B 569

MELLOR, J. I am of the same opinion. Looking at the photograph and plan, and applying them to the conveyance, it appears to me that the ornamentation was intended only for the general architectural effect, and that the intention was that the line dividing the two houses should, as it were, be carried out straight into the street. The conveyance is of the house in the occupation of Phipson, and there could be no actual enjoyment of this ornamentation, as there might have been of a balcony, if there had

1872

FOX

v.

CLARKE.

been one. If the wall marking the division between the two houses be taken as running into the street, that is enough to entitle the plaintiff to retain the verdict.

LUSH, J. I am unable to follow my learned Brothers to their conclusion; indeed, but for their opinions being so strong the other way, I should have said without the slightest doubt, that the part in question is part of the defendant's house. It is not denied that the conveyance of a house passes the entire fabric—the soil on which the house stands and the entire superstructure, and all that which goes to constitute part of the fabric itself. That reduces the question to the single point, whether the pillar, and the cornices and pediment, indeed that piece of the wall about two feet eleven inches in width, from the ground upwards on the side of the defendant's doorway towards the plaintiff's house, does or does not constitute part of “the house” intended to be conveyed by the deed to Phipson. It cannot be disputed that the owner of the soil, who proposes to build a house or a number of houses may, if he pleases, so build one as to make the frontage of it overlap another, or as to make the roof of one project over the land which he reserves to himself, as the pediment in the present case. He may do that if he please. What has he done here? He has placed that which is an integral and essential part of the portico of the defendant's house and the pillar which supports it on one side, so as to project and overlap the ground upon which the adjoining house stands, and all the way up the building he has carried out that projection, and the pediment overlaps the adjoining house still more beyond the line of the defendant's house. Did the owner, when he thus built the two houses, intend that this projection should form part of the fabric of the defendant's house? I cannot for a moment doubt that he did; that when he constructed that house with this architectural plan, he intended that pillar to support the portico, and the portico to be part of the house. Without that pillar the portico could not stand. He did, therefore, intend the pillar and portico to form part of the house, and if he intended it to be part of the house I can see no reason in law whatever, why it should not pass as part of the house, although the piece of the wall against which the pillar is built does, in fact, project beyond the line of building, and overlap part of the adjoining

ing house. I cannot at all see my way to the distinction between the pillar belonging to the house and not the pediment; because, in my idea, the pillar can only belong to the house as standing on soil belonging to the house; and if that is so, all the superstructure equally belongs to the house. If that is not the property of the defendant, I can see no reason at all why, if the plaintiff chose to pull down his house, he should not cut off from this fabric of the defendant part of the pediment, part of the portico, and take away the pillar, and so clear the frontage of the building to the line of his own house. There is nothing in the deed which, if this part of the fabric is not the defendant's property, compels the plaintiff to allow the defendant to use it as an easement. Therefore I cannot help holding that it is an integral part of the defendant's house. It is said it was only done for architectural beauty. But the man who builds a house in this ornamental style gets more for it because of the architectural beauty. And if this continuance of the architectural frontage did not pass as part of the defendant's house it would be competent to the plaintiff, after having sold the defendant a house which would only be entire by having these things left as part of it, to pull down the part in question, which would deface the house, take away its portico and make it altogether a different structure from that which it was when he sold it to the defendant. If the builder had carried a balcony over the portico to the extreme end adjoining the plaintiff's house, it does not seem to be disputed it would have belonged to the defendant. Why? Only because it stood on the soil of the defendant, and would be part of the fabric of the house. So, in my view, the pillar which supports the portico, the cornice and the pediment, which are necessary to complete the architectural fabric of the house, are as much part of the house as the balcony would be; for you cannot cut them off without making the house a different structure from what it was when the owner sold it. I therefore think our judgment ought to be for the defendant, but as the majority of the Court are of a different opinion, the rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *White & Borrett, for Westhorp, Ipswich.*

Attorney for defendant: *J. Crowdy, for Aldous & Pearce, Ipswich.*

1872

FOX
v.
CLARKE.

1872

May 31.

WULFF AND BILLING v. JAY.

Principal and Surety—Loss of Surety—Discharge of Surety—Laches of Creditor.

1 QBD 672
675
11 Ch D 98
5 QBD 142
9 QBD 687
8 App Cas
757.

The plaintiffs lent to B. and P., who were traders, 300*l.*, for the repayment of which the defendant became surety. At the time of the loan B. & P. assigned by deed dated the 25th of August, 1870, to the plaintiffs, as security for the debt, the lease of their business premises and plant, fixtures, and things thereon. The deed provided for the repayment of the loan upon the 25th of August, 1871, and for the payment of interest on the 25th of February, 1871, and stipulated, that until default in payment of either the principal or interest, B. & P. should continue in possession of the property assigned to the plaintiffs; and that upon such default the plaintiffs should not sell without giving B. & P. one month's notice in writing. This deed was not registered under 17 & 18 Vict. c. 36. B. & P. failed to pay interest upon the 25th of February, but the plaintiffs did not enter into possession. About a week before the 5th of August, the plaintiffs received notice that B. & P. were insolvent, but they allowed them to continue in possession, and on that day B. & P. filed a petition for liquidation under the Bankruptcy Act, 1869, and were adjudged bankrupts. The trustee under the bankruptcy seized and sold the goods and chattels assigned by the deed :—

Held, that the plaintiffs, by their omission both to register the deed and to seize the property assigned to them on default of payment of the interest, had deprived themselves of the power to assign the security to the surety, and that owing to their laches he was discharged to the amount that the goods were worth.

DECLARATION. That the defendant on the 25th of August, 1870, by deed covenanted with the plaintiffs, that he would on the 25th of August, 1871, pay unto the plaintiffs the sum of 75*l.*, or, if required so to do, purchase in the names of the plaintiffs or the survivor of them, in the books of the governor and company of the Bank of England, the sum of 82*l.* 8*s.* 4*d.* Three per Cent. Reduced Annuities, and would also on the 25th of August in each succeeding year pay the sum of 75*l.*, or if required so to do in manner aforesaid, purchase in the names of the plaintiffs, or the survivor of them, the sum of 82*l.* 8*s.* 4*d.* Three per Cent. Reduced Annuities; and would also yearly and every year, until the sum of 300*l.* should be fully paid and satisfied, pay unto the plaintiffs' interest on the sum of 300*l.*, or on so much thereof as should from time to time remain unpaid, or unpurchased, at and after the rate of 5*l.* per cent. per annum, to be computed from the date of the deed, and that in case default should be made in the payment of the sum of 300*l.*, or in the

investment of the sum of 329*l.* 13*s.* 5*d.* Three per Cent Reduced Annuities, at the times and in manner mentioned, the defendant would forthwith, after such default should have been made, upon the request of the plaintiffs, repay the plaintiffs the sum of 300*l.*, or so much thereof as should be unpaid, or invest the said sum or the residue thereof then unpaid, in the purchase of 329*l.* 13*s.* 5*d.* Three per Cent. Reduced Annuities, or so much thereof as should not have been repaid or reinvested. And the defendant did not pay the sum of 75*l.* on the 25th of August, 1871, nor has he paid the interest on the sum of 300*l.* for the year ending the 25th of August, 1871; and although defendant made default in payment of the sum of 75*l.*, the first instalment of the sum of 300*l.*, and the plaintiffs requested the defendant to repay the 300*l.*, yet the defendant has not paid the same, and the 300*l.* and interest from the date of the deed still remains wholly due in arrear and unpaid.

Plea, upon equitable grounds, that the deed set out in the declaration was made between one Burns of the first part, defendant of the second part, and the plaintiffs of the third part, and by the deed the plant and stock in trade of Burns and his partner Pim were assigned to the plaintiffs as security for the sum of 300*l.* advanced by the plaintiffs to Burns and his partner Pim. And that after the execution of the deed, to wit, on the 6th of August, 1871, a petition for liquidation was filed in the London Bankruptcy Court by Burns and Pim; that a trustee to the joint estate of the two petitioners was duly appointed, and that the plant and stock in trade of the petitioners being the same assigned to the plaintiffs by the deed recited in the declaration, were sold by public auction, of all which premises the plaintiffs had due notice and were well aware; but of all which premises the defendant knew nothing, and received no notice; and that such plant and stock in trade were more than sufficient to cover the sum advanced by the plaintiffs to Burns, and to satisfy the debt, for the payment of which the defendant became surety for Burns, and entered into the covenants set forth in the deed. And that the plaintiffs did not, as it was their duty to do, take possession of the plant and stock in trade, but allowed the same to be taken possession of by the trustee appointed to the joint estate of Burns and Pim, and permitted the

1872

WULFF
v.
JAY.

1872

WULFF
v.
JAY.

same to be sold and applied to the liquidation of the debts of Burns and Pim, other than to secure the payment of which the said plant and stock in trade were assigned the plaintiffs. And that by their conduct in this respect the plaintiffs have exonerated the defendant from the covenants entered into by him in the deed recited in the declaration.

Issue joined.

At the trial, before Quain J., at the Middlesex sittings after Hilary Term, 1872, the following facts were proved. In the month of August, 1870, Messrs. Burns and Pim, who carried on the business of printers in partnership, applied to the plaintiff, Billing, who was an attorney, for a loan of money. Billing agreed to lend them the sum of 300*l.*, part of certain trust moneys in the funds, in the name of himself and the plaintiff Wulff; and he stipulated that Burns and Pim should give by way of security a mortgage of the lease of the partnership premises, and of the plant, fixtures, and goods therein, and also that two sureties should join in a guarantee for securing the payment of the mortgage money.

The mortgage deed was dated on the 25th of August, 1870, and was made between Burns and Pim, thereafter called the mortgagors, of the first part, the defendant, thereafter called the surety, of the second part, and the plaintiffs, thereafter called the mortgagees, of the third part, and after reciting that the plaintiffs had sold the sum of 329*l.* 13*s.* 5*d.* Three per Cent. Reduced Annuities, standing in their joint names, which had produced the sum of 300*l.*, and that the repayment of that sum, or the repurchase of the sum of 329*l.* 13*s.* 5*d.*, should be secured, the deed assigned to the plaintiffs the partnership premises, consisting of a workshop, for the residue of a term of twenty-one years, and also assigned the plant, trade fixtures, goods, chattels, and things upon the premises, subject to a proviso for redemption if the mortgagors should pay to the mortgagees on the 25th of August, 1871, the sum of 75*l.*, part of the 300*l.*, or if required so to do by the mortgagees, purchase in the name of the mortgagors the sum of 82*l.* 8*s.* 4*d.* Three per Cent. Reduced Annuities, and also on the 25th of August in each succeeding year, pay 75*l.* or purchase the sum of 82*l.* 8*s.* 4*d.* Three per Cent. Reduced Annuities; and also if the mortgagees should pay interest on the sum of 300*l.*, or on

so much thereof as should for the time being remain unpaid or unrepurchased, after the rate of 5*l.* per cent. per annum by equal half-yearly payments on the 25th of February and the 25th of August in every year; and until default should be made by the mortgagors in the payment or investment as mentioned, the mortgagors should remain in possession and receipt of the rents, profits, &c., of the workshop, plant, fixtures, and things. The deed contained a power of sale on default being made in the repayment or investment of the principal sum, or in the non-payment of the interest, provided that one calendar month's notice in writing be given to the mortgagees requiring payment before exercising the power of sale. The deed contained covenants by the mortgagors and the surety, to pay the principal and interest according to the agreement of the parties.

The first half-year's interest became due on the 25th of February, 1871, and was not paid. Shortly afterwards the mortgagors became embarrassed, and on the 5th of August, 1871, filed a petition for liquidation, in the London Court of Bankruptcy, and were adjudged bankrupts on the 20th of August; one Venn, a partner of the plaintiff Billing, acting for the mortgagees in the bankruptcy proceedings. Their insolvency, prior to the bankruptcy, was, a week before the petition was filed, well known to the plaintiff Billing, to whom they were otherwise indebted. The deed of assignment was not registered under 17 & 18 Vict. c. 36, and the trustee appointed by the Court of Bankruptcy took possession of the plant, fixtures, and things, which were afterwards sold for the benefit of creditors, and realized 300*l.*

On these facts a verdict was by consent entered for the plaintiffs for 340*l.*, leave being reserved to enter the verdict for the defendant, the Court having power to draw inferences of fact.

A rule was afterwards obtained to enter a verdict for the defendant, or to reduce the damages to such sum as the Court should direct, upon the grounds that on the facts proved the defendant had an equitable defence to the action, and as surety was discharged as to the whole or part of the claim: that the equitable plea was proved, and that the plaintiffs were guilty of such laches and conduct as would in equity discharge him as surety.

H. T. Cole, Q.C., and *Gibbons*, shewed cause. It will be con-

1872

WULFF
v.
JAY.

1872
WULFF
v.
JAY.

tended for the defendant that he is discharged; first, because the plaintiffs have not registered the assignment; secondly, because they have been guilty of laches in omitting to enter upon the mortgaged premises and to seize the goods comprised in the deed. These grounds are untenable. The omission to register is in itself of small moment, because, without entry, the goods and chattels would have passed to the trustee in bankruptcy as being under the bankrupts' order and disposition. This is clear from *Badger v. Shaw*. (1) As there is no express power in the deed to enter and seize, the plaintiffs could only sell after giving a month's notice, and mere laches on the part of the creditors in not seizing does not discharge the surety. A mere omission by the creditors to do an act beneficial to the surety does not discharge him: *Black v. Ottoman Bank*. (2) *Watts v. Shuttleworth* (3) is distinguishable on the ground that the creditor failed to perform what he had undertaken to do. In Story's Equity Jurisprudence, s. 326, it is laid down that there is no positive duty incumbent on the creditor to prosecute measures of active diligence, and therefore mere delay on his part will not amount to laches so as to discharge the surety. The plaintiffs have done no act against the faith of the contract with the surety, therefore he is not set free from liability: *Petty v. Cooke*. (4) At all events the surety is not altogether discharged; he is discharged only pro tanto: *Capel v. Butler* (5); *Strange v. Fooks*. (6) Here the verdict can only be reduced by the amount for which the goods sold.

Prentice, Q.C., and *Baker Greene*, in support of the rule. Upon the first day for payment of interest, viz., the 25th of February, 1871, the debtors made default: the plaintiffs might then have entered and seized, although they could not have sold without a month's notice. By entry and seizure they would have defeated the operation of both 17 & 18 Viet. c. 36, and the Bankruptcy Act, 1869, s. 15, subs. 5. The plaintiffs were again guilty of laches in not entering and seizing a week before the filing of the debtors' petition for liquidation, at which time the plaintiff Billing had notice that the debtors were in insolvent circumstances. The

(1) 2 E. & E. 472; 29 L. J. (Q.B.) 73.

(2) 15 Moore P. C. 472.

(3) 5 H. & N. 235; 29 L. J. (Ex.) 229.

(4) Law Rep. 6 Q. B. 790.

(5) 2 S. & S. 457.

(6) 4 Giff. 408.

7 Jan 45. 946

9 Jan 45. 946

words at the end of s. 326 in Story's Equity Jurisprudence are in defendant's favour; the author says that if the creditor by his negligence loses a security, the loss will operate at least to the value of the security to discharge the surety. The surety is protected against the laches of the creditor, not only in equity but also at law, by virtue of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5; by that enactment the surety, on payment of the debt, is entitled to an assignment of all securities, possessed by the creditor, but in this case the security is destroyed, and therefore cannot be assigned to the defendant: *Watts v. Shuttleworth* (1) is precisely in point.

[QUAIN, J. An omission to register a memorial of an annuity bond discharges the surety: *Straton v. Rastall*. (2)]

COCKBURN, C.J. This is an action brought against the defendant, as surety. It appears that as part of the transaction between the principal creditors and the debtors, there was to be a mortgage of the plant, trade fixtures, and things upon the debtors' premises, by bill of sale as security for the principal debt. The debtors were to remain in possession of the things thus mortgaged until default, and the creditors were to have power, in the event of a default in the payment of the instalments of the debt which were to be paid under the bill of sale, or in the event of the interest, which was to accrue from time to time, not being paid, to enter and sell the things thus assigned upon giving a month's notice.

Now, it appears that in the month of February interest first became due, and that interest was not paid, and it remained unpaid until the month of August, when the debtors became bankrupt. It further appears that the insolvent condition of the debtors' affairs was plain, and that bankruptcy was imminent, and had been impending for some time before it actually took place; and it further appears that one of the creditors was cognizant of that fact, and was afterwards, when the bankruptcy took place, solicitor to the proceedings in bankruptcy. He was therefore perfectly aware of the bankruptcy being imminent. Notwithstanding he took no steps either to protect the bill of sale by registration, or to enter and take possession of the effects.

(1) 5 H. & N. 235; 29 L. J. (Ex.) 229.

(2) 2 T. R. 366.

1872

WULFF
v.
JAY.

7 Jan 25. 96/11

1872

WULFF

v.
JAY.

Now, I think there was a twofold laches on the plaintiffs' part—laches in the first place in not registering the bill of sale. If they had registered it the effect would have been that the fixtures would have been protected. That would not have applied to the other moveables which remaining in the order and disposition of the bankrupt would have been affected by the bankruptcy. But then there was laches if possible of a more serious description affecting not only the moveables but the fixtures also. The plaintiffs might have entered and taken possession upon the interest not being paid at the time when it became due. Instead of doing this, however, they allow the mortgagors to remain in possession when they see that bankruptcy is impending and imminent. I cannot doubt myself that their intention was, that, being creditors ultra the amount thus secured, the goods in question should be available as assets under the bankruptcy, while they had the security of the defendant to come upon in order to get paid the debt of 300*l.* secured by the bill of sale. I think, looking at all the circumstances, it is impossible to say that the plaintiffs did what they ought to have done to realize the security they possessed. Cases have been cited and authorities have been referred to in Story's Equity Jurisprudence, which abundantly establish that which is a common and well-known proposition, that where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realize the securities and recoup himself the amount of the debt which he has had to pay. That is now a well-known proposition. Here, by registering the bill of sale, and by afterwards availing themselves of the power which they possessed to take possession, the plaintiffs might have secured the payment of the debt to themselves, or by protecting the securities and holding them in their hands they could have made them over to the surety when the surety was willing, or was called on, to pay; but by omitting to do what was necessary in order to place themselves in that position, and by

allowing bankruptcy to supervene so as to enable the trustee under the bankruptcy to take possession of these goods adversely, it is clear that they have placed the surety in a position very detrimental and prejudicial to the surety; and for that the surety ought to have, according to the general doctrine, a remedy. I think the creditors have clearly been guilty of laches in not protecting themselves, and in not availing themselves of these securities. Then it is said, granted that at the end of the time when the interest had accrued the surety was liable both for principal and interest, and the principal and interest together amounted to 307*l.* 10*s.*, although the surety is entitled to say to the creditors, "I am entitled either to have such security as you have made available for this debt, or I am entitled to set off the amount against what I owe you under my agreement to indemnify you against loss in respect of this debt," yet he can only say it to the extent of the value of the security itself. Now, it appears that these goods which the creditors might have taken possession of and made available for the payment of the debt, or to which they might have given the surety a title in order that the surety might recoup himself the amount of his debt, were of the value of 300*l.* They sold for 300*l.* That is exactly the amount of the original principal debt, and there is nothing to satisfy us that they did not realize their value; I do not find anything leading to any other conclusion than that the goods did in fact sell for what they were really worth. We must take it, therefore, that all that was realized was 300*l.* Now, interest having accrued, the debt was 307*l.* 10*s.*, and in respect of the odd money, the plaintiffs must have their verdict. There will, therefore, be a verdict for the plaintiffs for 7*l.* 10*s.*

1872

WULFF
v.
JAY.

HANNEN, J. I am of the same opinion. I think that the plea is substantially proved. We are not bound by the exact terms of it; but I take it to be established that the defendant became surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the plaintiffs; and he was entitled, therefore, to the benefit of that real and substantial security in the event of his being called on to fulfil his duty as a surety, and to pay the debt for which he had so become surety. He will, however, be discharged from his liability as surety if the

1872

WULEF
v.
JAY.

creditors have put it out of their power to hand over to the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the notes in *Rees v. Barrington*. (1) "As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual, by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands." And numerous cases are cited in support of those statements.

Now, let us see whether there has been such failure on the part of the principal creditors in this case. It was argued by Mr. Cole that there was no power to do anything by way of realizing the securities until after the month's notice. But that is not so. There is no power to realize by selling without notice, but the mortgagors are only entitled to retain possession of the property until they make default, and on their making default the mortgagees have the ordinary right of mortgagees to seize that which is already their property, although they are restrained by the terms of the deed from selling immediately. Default was made, according to the terms of the deed, in February, when the first instalment of interest became due. Upon default taking place, the mortgagees, if they had chosen to act upon the power given them by the deed, might have taken possession of this property, the effect of which taking possession would have been to defeat both the Bills of Sale Act and the order and disposition clause in the Bankruptcy Act, and they would have been in a position, therefore, to hold this property as against the trustee in bankruptcy. I am not prepared to say that they were guilty of such laches the instant the interest became due as would have entitled the surety to maintain that he was released, but I think that is a question which might have gone to the jury; and if I were in the place

(1) 2 White & Tudor's L. C., 4th ed., at p. 1002

of the jury I should certainly find that there had been laches and negligence on the part of the plaintiffs. The interest is due in February, when they might have seized, and they take no step whatever until the bankruptcy intervenes in August, although shortly before the bankruptcy took place they became aware that the circumstances of the debtors were such as would make it right, in the interest of all parties concerned, that the security should be protected. And the case is all the more strong because one of the plaintiffs is an attorney, and therefore he would be likely to know the law; but it is clear that, he having delayed so long to take possession, there were circumstances from which the jury would be warranted in finding that there was negligence on the part of the plaintiffs in that respect, and in consequence of that negligence, the value of this security has been lost.

Then with regard to the amount: when the first payment of interest became due, the surety at one and the same moment becomes liable to pay 300*l.*, and 7*l.* 10*s.* That was the amount for which he was liable. I think he was not liable for anything more than that, because being discharged from the principal sum by the laches of the creditors, he is also discharged from that which is incident to the principal, namely, the interest; but that does not apply to the interest which became due at the same moment as the principal became due, and which therefore was a debt or a liability which then accrued to the surety. Then, if the security had been handed over to him, as the event shews, he would not have been able to realize by way of recouping himself more than 300*l.*, and it follows he would remain liable for 7*l.* 10*s.*, and I think therefore that the verdict ought to be reduced to that amount.

QUAIN, J. I am of the same opinion. The rule, as it is laid down by Stuart, V.C., in *Strange v. Fooks* (1), is in these words:—“It is perfectly established in this court, that if through any neglect on the part of the creditor, a security to the benefit of which a surety is entitled is lost, or is not properly perfected, the surety is discharged.” It seems to me that this case comes directly within that rule. The deed expressly provides that, “in

1872

WULFF
v.
JAY.

(1) 4 Giff. at p. 412. *J. H. S. 944*
3 K 2 1

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1872
WULFF
v.
JAY.

the mean time, and until default be made by the mortgagors in the payment or investment, as hereinafter mentioned, the mortgagors shall remain in the possession and receipts of the rents and profits of the premises, plant, fixtures, and things," and it gives the mortgagees the right to seize on default being made, and every other remedy, except selling, for which it is requisite that there should be a month's notice. Now that being the case, the debtors make default on the 25th of February, 1871, and the mortgagees take no steps to protect the goods from the operation of the Bills of Sale Act, if it is within that Act, or from the reputed ownership clause in the Bankruptcy Act. They do not take possession of the fixtures or plant, or any of these goods, but allow the property in them to pass to the trustee. The mortgagees well knew the state of their debtors, one of the mortgagees being the attorney who conducted the bankruptcy proceedings. The result is, that the mortgagees stand by and allow the whole of this property to be swept away by the trustee in bankruptcy, and sold for the benefit of the estate. It appears to me, therefore, that that property which has been allowed to be sold by the mortgagees, is the very property which the surety was entitled to have handed over to him if he paid the sum that was due, viz., 307*l.* 10*s.* It seems to me to fall precisely within the rule that has been referred to, and that pro tanto the surety is discharged, and the verdict ought to stand only for 7*l.* 10*s.*

Rule absolute to reduce the damages accordingly.

Attorneys for plaintiffs: *Billing & Venn.*

Attorneys for defendant: *Merriman, Powell, & Co.*

FENNER v. THE LONDON AND SOUTH EASTERN RAILWAY
COMPANY.

1872

June 11.

*Inspection of Documents—Privilege—Communications after Litigation con-
templated—Discretion.*

Communications between a person and his solicitor or counsel, or any person acting as their deputy, with a view to obtain legal assistance and advice, are privileged, and the Court cannot compel them to be disclosed.

Communications with any other person, although taking place after litigation is contemplated, are not necessarily privileged; but it is in the discretion of the Court to compel or abstain from compelling their production.

If such communications are substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the Court ought as a general rule to be to refuse inspection. Where they fall short of this, it should, as a general rule, be granted.

ACTION for late delivery and defective condition of cattle carried by the defendants upon their railway for the plaintiff.

An order was made by Blackburn, J., at chambers, granting the plaintiff inspection of certain documents in the possession of the defendants. A rule having been obtained on the part of the defendants to shew cause why the order should not be varied:—

May 8. *Thesiger* shewed cause. (1)

Willis supported the rule. The facts of the case, the arguments, and the cases cited, fully appear in the judgment of the Court.

Cur. adv. vult.

June 11. BLACKBURN, J. This was a rule obtained by Mr. Willis, to vary an order made by me at chambers, for the inspection of certain documents, scheduled by the officer of the defendants.

Before me at chambers, the only affidavit used was that of Mr. Noden, the goods manager of the defendants. The material part of this affidavit was as follows:—

“ That the company have in their possession, or under their control, the following letters or documents, relating to the matters interrogated to, or the matters in dispute in the action :

A way-book kept at Battle station ; telegram from Fenner to Breach, dated the 21st of October ; letter from Neek and Donald-

(1) In the Bail Court, before Blackburn, Hannen, and Quain, JJ.

See McQuodale v. Bell 10 CPD 471

10 CPD 471-6
9 CPD 298
350-12-8
10 CPD 143
20 CPD 65
10 CPD 474
476-7-8
480-4

1872
FENNER
v.
LONDON AND
SOUTH
EASTERN
RAILWAY CO.

son (1) to Eborall, defendants' general manager; 25th, letter from E. B. Noden, defendants' goods manager, to Breach, station-master, Battle; 26th, report, Breach to Noden; 1st of November, letter, Noden to Breach; 1st, letter, Noden to Parker; 2nd, letter, Breach to Noden; 3rd, letter, Neek and Donaldson to defendants' general manager; 6th, letter, Parker to Noden; 2nd, report, Page to Parker; 7th, letter, Parker to Noden; 9th, letter, Noden to Neek and Donaldson; 10th, letter to Greenish from Noden; 11th, letter, Noden to Greenish; 15th, letter, Noden to Greenish; 16th, letter, Greenish to Noden; 20th, letter, Noden to Ashley; 20th, letter, Noden to Birt; 21st, letter, Birt to Noden; 23rd, letter, Noden to Breach; 23rd, letter, Ashley to Noden; 24th, letter, Birt to Noden; 24th, report, Breach to Noden; 27th, letter, Noden to Breach; 28th, letter, Noden to Birt; 4th of December, letter, Breach to Noden; 9th, letter, Birt to Noden. 1872, 2nd of January, report, Noden to defendants' solicitors; 9th February, letter from Birt to E. B. Noden; 10th, from E. B. Noden to defendants' solicitors; 10th, letter from Birt to E. B. Noden; 10th, ditto, ditto. With the exception of the letters received from the plaintiff or his attorney, the way-bill, guard's report, and the telegrams from the plaintiff, I object to produce, or allow inspection of, any of the foregoing documents, writings, or letters, on the ground that they were not written or made in the ordinary course of the duty of the person or persons writing or making them, but were made confidentially for the purpose of, or with a view to, litigation, and resisting the plaintiff's claim."

But, in addition to this affidavit, a correspondence between the plaintiff's solicitors and the manager of the defendants was used, which though not verified by affidavit, was (according to the common and very convenient practice at chambers), by tacit consent, used as if it had been so verified. The first of those letters was one from the plaintiff's solicitors to the defendants' general manager, dated the 21st of October, stating that the solicitors were informed by their client that his cattle had been delivered by the defendants too late, in a wretched condition, and much deteriorated in value. The letter contained no express statement that the plaintiff meant to commence an action if not compensated; but

(1) Neek and Donaldson were the plaintiff's attorneys.

I think it must be taken that on receipt of that letter, the manager would be aware that litigation would be very probable. On the 29th of October, the manager wrote in answer that he would make inquiries, and communicate the result to the plaintiff's solicitors. On the 3rd of November, the plaintiff's solicitors again wrote, and received an answer from Noden, the goods manager, dated the 9th of November, stating that the former letter had been sent to him, as referring to his department, that he was pursuing his inquiries with all possible despatch, and would reply definitely to their letter as soon as practicable. On the 1st of December, the plaintiff's solicitors again wrote requesting a reply. No such reply was ever sent. On the 11th of December the writ was issued. These dates are, in my opinion, material.

The view which I took of the matter at chambers was, that the general rule is, that a litigant is entitled to a discovery of all the documents in his adversary's possession which are relevant to his case, subject to some exceptions. It is not necessary that the documents should be in themselves evidence, for I apprehend that the plaintiff in discovery in equity has a right to require the defendant to answer, or, as it is sometimes worded, to search his conscience [as to his knowledge, information, and belief. As is stated by Lord Langdale in *Greenlaw v. King* (1), "the general rule of the Court is, no doubt, that what the defendant knows relating to the matters in question the plaintiff has a right to know also, and for this very purpose, to prevent the defendant from suppressing within his own breast the matters material to the determination of the question between the parties." He proceeds to state that there are exceptions. I thought that the documents specified in the schedule were obviously relevant to the question in dispute, and therefore fell within the general rule, and that the only question was, whether they fell within any exception. Mr. Willis contended broadly, that as they were answers to questions put by the defendants after litigation was impending, they were necessarily privileged, and if I had thought that there was any such general rule I should have refused to make the order. It occurred to me that there might be a distinction between the earlier documents and the latter ones; for I thought it almost

1872

FENNER
v.
LONDON AND
SOUTH
EASTERN
RAILWAY Co.

10 PD 47

(1) 1 Beav. at p. 143.

1872

FENNER

v.

LONDON AND

SOUTH

EASTERN

RAILWAY CO.

10 PD 477

certain, from the materials before me, that the first letter from the manager in town to the local officer would be something to this effect: "We have a complaint as to the delay in delivering cattle at your station. Report to us the circumstances." And I thought the report sent in answer to such an inquiry would not be privileged. But I thought it also possible that some of the later letters might be something to this effect: "It seems probable that, if we resist this claim, much will depend on the evidence of some particular person as to some particular fact. Please to learn from him what his evidence will be, and communicate to us the result." And if such had been the fact, I should, in the exercise of the discretion which I think is vested in the judge, have refrained from ordering the inspection of the answer to that letter, without determining whether I had power to order it or not. Having this in my mind, I asked Mr. Willis whether he made any distinction between the documents. He made none; stating that he relied on a principle, which his clients thought of great importance, stated in the last paragraph of Noden's affidavit. Being of opinion that there was no such principle, I made the order to inspect all the documents, except the report of the defendant's solicitors.

Mr. Willis, when moving, fairly and fully stated to the Court what were the materials before me; but, by some mistake, the rule was drawn up on reading an affidavit not made before me, and omitting all mention of the correspondence. On cause being shewn before my Brothers Hannen, Quain, and myself, it was agreed that this was wrong, and that the rule was to be treated as if drawn up on reading the materials which were before me at chambers, which I have above stated. I am still of the opinion which I formed at chambers, that the inspection should be granted. There is no doubt that, on grounds of public policy, the communications between a person and his solicitors and counsel, with a view to obtain legal assistance and advice, are privileged; and so far as the communications made with a person, not himself a solicitor, can be considered as made with him as deputy to the solicitor, they are also privileged: *Steele v. Stewart*. (1) And this, I apprehend, is a positive right of the client, which the Court cannot deprive him of. But when the communications are made

(1) 1 Phil. 147.

with a person not in any way connected with the legal advisers of the defendant, the question is one of much more difficulty.

In the case of *Greenlaw v. King* (1), Lord Langdale went so far as to order the inspection of the correspondence between the defendant and a gentleman called Leigh, who had been his late father's solicitor, with respect to the matters in controversy, and who continued to act as the agent and adviser of the defendant, though not as his solicitor, giving as his reason, "they are communications which have taken place between the defendant and Leigh, not in his character of solicitor, and it cannot be said that a mere friend is a person so confidential that a communication with him is privileged." This is certainly a strong authority for this proposition, that the Court has power to order such an inspection. And accordingly a Court of common law has, in cases where it was of opinion that justice required such an inspection, ordered it: *Colman v. Trueman* (2); *Baker v. London and South Western Ry. Co.* (3). But it has been held that a Court of common law, at least, has not a mere ministerial duty to order an inspection of documents, admitted to be relevant, and not brought strictly within the privilege of professional advice: *Chartered Bank of India v. Rich* (4); and this was acted upon in *Woolley v. North London Ry. Co.* (5), in which case the Court ordered the inspection of those reports which they thought, though made after litigation, were not in the nature of proofs for the trial, and refused the inspection of the reports of the scientific witnesses, which they thought were of that nature.

It is obvious that whenever—to borrow the language of Willes, J., in *London Gas Co. v. Chelsea* (6)—"the case comes very near the dividing line, at which the province of discovery ceases," there is a chance that different minds may come to opposite conclusions as to how the judicial discretion should be exercised. The principle, however, I think, to be derived from all the cases is that, where it appears that the documents are substantially rough notes for the case, to be laid before the legal adviser, or to supply the proof to be

1872

FENNER
v.
LONDON AND
SOUTH
EASTERN
RAILWAY CO.

1 C.P.D. 476

(1) 1 Beav. 137.

(4) 4 B. & S. 73; 32 L. J. (Q.B.)

(2) 3 H. & N. 871; 28 L. J. (Ex.) 5. 300.

(3) Law Rep. 3 Q. B. 91.

(5) Law Rep. 4 C. P. 602.

(6) 6 C. B. (N.S.) 411; 28 L. J. (C.P.) 257.

4 June No. 470

1872
FENNER
v.
LONDON AND
SOUTH
EASTERN
RAILWAY CO.

inserted in the brief, the discretion of the Court should, as a general rule, be to refuse the inspection. Where the documents fall short of that, it should, as a general rule, be granted. It must of course often be difficult, on the materials before a judge, to determine within which class particular documents fall. A convenient course is often pursued at chambers, by producing the documents for the inspection of the judge, who can generally at a glance see if they ought to be produced. This can only be done by consent, as the party asking for discovery does not see the documents, and the judge cannot act on *ex parte* evidence without consent. But that consent is, I believe, never refused. In the present case, no such offer was made on the part of the defendants, who stood on the ground that all written questions asked, and written answers given after litigation was threatened, and not made in the ordinary course of the duty of the person making them, were privileged.

Woolley v. North London Ry. Co. (1) is an authority that a report sent by the subordinate to his superior, in consequence of a general order to report, is not privileged, whether it was made before or after the litigation began; and I cannot think that such a report would be the more privileged because it was specially asked for. It is to be remembered that the principle now contended for is not confined to railway companies. It would apply to all cases, and would privilege the answer of the mate of a vessel to whom the shipowner had written to say that there was a complaint of short delivery of goods, and requesting an explanation; and many other mercantile cases which might be suggested. I think to lay down any such principle would greatly diminish the benefit to be derived from discovery.

My Brother Quain agrees with me for the reasons I have just stated. My Brother Hannen agrees in the result, but will add something for himself.

HANNEN, J. I agree in the general principles explained by my Brother Blackburn, and by which he intended to be guided in the exercise of his discretion. And it does not follow that his discretion should be overruled because I, in the exercise of my discretion, should have acted differently. I should have drawn the inference

that the great bulk of the letters written by the servants of the company, after the inquiry, must be privileged; I should rather have thought that there might be some slight exceptions. If Mr. Willis had thought it worth his while to discriminate the letters I should, if at chambers, have asked to see them, that I might determine whether I should have made any distinction between them.

1872

FENNER
v.
LONDON AND
SOUTH
EASTERN
RAILWAY CO.

Rule discharged.

Attorneys for plaintiff: *Nethersole & Speechley.*

Attorney for defendants: *E. P. Cearns.*

THE QUEEN *v.* ARMITAGE AND ANOTHER, JUSTICES OF THE WEST RIDING OF YORKSHIRE.

June 6.

Bastardy—Jurisdiction—Evidence of Mother—Death before Hearing.

A bastardy order cannot be made without the mother of the child being examined as a witness on the hearing.

Where, therefore, the mother died after the issue of the summons, but before the hearing:—

Held, that there was no jurisdiction to make an order.

RULE, obtained on behalf of Wright Brierly to shew cause why a writ of certiorari should not issue to remove an order of two justices of the West Riding of Yorkshire, whereby they had adjudged Brierly to be the putative father of a bastard child, on the ground that the order had been made after the death of the mother, she having died before the hearing, and her evidence, therefore, not having been taken. (1)

(1) 7 & 8 Vict. c. 101, s. 2, enacts, that "any single woman who may be with child, or who may be delivered of a bastard child, . . . may . . . make application to any one justice . . . for a summons to be served on the man alleged to be the father of such child; and such justice shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session. . . ."

By s. 3, "The justices in such petty session shall hear the evidence of such

woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child."

This is now repealed; but the new statute, 35 & 36 Vict. c. 65, s. 4, is in similar terms.

1872
THE QUEEN
v.
ARMITAGE.

June 10. *Sir John Karlake, Q.C. (A. L. Smith with him),* appeared for the justices. (1)

Waddy shewed cause on behalf of the grandmother of the child. *Besley* supported the rule.

The following cases were cited: *Reg. v. Buckinghamshire* (2); *Reg. v. Middlesex* (3); *Reg. v. Leicestershire* (4); *Rex v. Ravenstone* (5); *Rex v. Clayton* (6); *Reg. v. Read* (7); *Reg. v. Maude* (8); *Hodges v. Bennett* (9); *Rex v. Eve*. (10)

The facts and arguments sufficiently appear in the judgment of the Court.

Cur. adv. vult.

July 6. The judgment of the Court was delivered by

HANNEN, J. This was a rule for a certiorari to bring up a bastardy order of justices for the purpose of its being quashed. The material facts are these. A bastard child was born on the 23rd of January, 1872. On the 13th of February the mother made application to a justice for a summons against the alleged father, under 7 & 8 Vict. c. 101, s. 2. On the 20th of February, and before the hearing of the summons, the mother died. On the 27th the summons was heard, and an order made against the alleged father. The question we have to determine is, whether the order was properly made without the evidence of the woman herself.

This depends on the construction to be put on the 3rd section of the above cited Act. By that section it is enacted that, after the birth of such bastard child, on the appearance of the person so summoned, the justices in petty sessions shall hear the evidence of such woman, and such other evidence as she may produce, and if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the justices, they may adjudge the man to be the putative father of such bastard child.

It was contended, in opposition to the rule, that the object of this section was merely to clear up doubts as to the admissibility of the evidence of the mother, and that it did not render it obli-

(1) In the Bail Court, before Hannen and Quain, JJ.

(2) 18 L. J. (M.C.) 113; 3 New Sessions Cases, 500.

(3) 5 D. & L. 580; 17 L. J. (M.C.) 111.

(4) 15 Q. B. 88; 19 L. J. (M.C.) 209.

(5) 5 T. R. 373.

(6) 3 East, 58.

(7) 9 Atk. 619.

(8) 2 Dowl. N. S. 58.

(9) 5 H. & N. 625; 29 L. J. (M.C.)

229.

(10) 2 Show. 257.

gatory that such evidence should be given if other sufficient proof could be afforded ; and it was argued that this construction was to be adopted, rather than one which would render proceedings in bastardy impossible, not only in case of death of the mother, but also in case of her being of unsound mind or otherwise incapable of being a witness. We, however, are of opinion that the statute makes it necessary that the mother shall be called as a witness. The remedy provided is given to the mother only. In the event of her death without having made an application, it is clear that no one else can take proceedings against the supposed father. It was to be expected, therefore, that in the event of the death of the mother before the hearing of the summons, proceedings which could not in that state of circumstances have been instituted should not further be prosecuted. But we are further of opinion that it was the intention of the legislature, having regard to the peculiar nature of such inquiries, that the mother should support her accusation by her oath, and submit herself to cross-examination. The paternity of the child is a fact as to which no evidence can be satisfactory without the statement of the mother ; and the peculiar language of the statute, requiring that the evidence of the mother shall be corroborated by other testimony cannot, as it seems to us, be given reasonable effect to without holding that the mother herself must be a witness on her own behalf.

With regard to the instances of alleged hardship in which the production of the evidence of the mother may be impracticable, it is sufficient to say that these, if within the contemplation of the legislature, were probably deemed to be of such rare occurrence as not to make it expedient to make an exception in their favour from the general law applicable to this peculiar class of cases.

We do not pronounce any opinion upon the effect of the death of the mother after the hearing and before the appeal. That would undoubtedly be subject to considerations which it is not necessary to enter upon in this case.

For these reasons we think that the rule should be made absolute.

Rule absolute.

Attorney for Brierley : *T. T. Calvert.*

Attorneys for justices : *Shum & Crossman.*

Attorneys for the grandmother of the child : *Learoyd & Learoyd.*

1872

THE QUEEN
v.
ARMITAGE.

1872
June 11. IN THE MATTER OF LORD FITZHARDINGE v. THE GLOUCESTER AND
BERKELEY CANAL COMPANY.

Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 34—Lands Clauses Consolidation Act, 1869, (32 & 33 Vict. c. 18) s. 1—Compensation—Amount offered—Taxation of Costs.

1 QBD 698
700
4 QBD 64
504
429.
A canal company requiring to purchase the claimant's land, received a notice from the claimant, claiming 28,000*l.* as compensation. On the 18th of August, the company, under s. 38 of the Lands Clauses Consolidation Act, gave the claimant notice of their intention to issue their warrant for summoning a jury, and offering 15,237*l.* as the sum they were willing to give. On the 28th of August the claimant gave the company notice, under s. 23, of his desire to have the compensation settled by arbitration. On the 26th of October the company gave the claimant notice that they had appointed an arbitrator, and offered 17,000*l.* as compensation. On the 8th of November the claimant appointed an arbitrator. On the 18th of November the two arbitrators appointed an umpire. The umpire awarded the claimant 16,400*l.* :—

Held, that the offer of 17,000*l.*, having been made when the first arbitrator was appointed and before the beginning of the arbitration, was a good offer, and was not invalidated by the previous offer of 15,237*l.*; and the sum awarded being a less sum than 17,000*l.*, the claimant was not entitled to the costs of the arbitration, under s. 34.

The master is not bound, under s. 1 of the Lands Clauses Consolidation Act, 1869, to tax the costs of an arbitration unless the claimant is entitled to costs under s. 34 of the Lands Clauses Consolidation Act, 1845.

RULE calling upon the Gloucester and Berkeley Canal Company to shew cause why a mandamus should not issue, directed to one of the Masters of the Court, commanding him to tax and settle the costs of Lord Fitzhardinge of and incidental to a certain arbitration between him and the Gloucester and Berkeley Canal Company, and award made therein, under the provisions of the Lands Clauses Consolidation Acts, 1845 and 1869.

The Gloucester and Berkeley Canal Company proceeded in 1870, under 33 & 34 Vict. c. lxi., in which the Lands Clauses Consolidation Act (8 Vict. c. 18), was incorporated, to take land belonging to Lord Fitzhardinge. On the 22nd of June, 1870, the company, under s. 18 of the Lands Clauses Consolidation Act, gave notice to Lord Fitzhardinge of their intention to take the land, and stated the particulars of the land required. On the 17th of August the company received a notice from Lord Fitz-

hardinge, setting forth the nature of his interest in the land, and claiming 28,000*l*. On the 18th of August the company gave notice, under s. 38, of their intention to issue a warrant to the sheriff to summon a jury, and offered a sum of 15,237*l*. as the sum they were willing to give for the land. By a notice dated the 22nd of August, but received by the company on the 28th of August, Lord Fitzhardinge gave notice, under s. 23, requiring the matter to be referred to arbitration. On the 24th of October the company appointed Mr. Struge as their arbitrator; and upon the 26th of October they served Lord Fitzhardinge with a notice, dated the 25th of October, stating that they had appointed Mr. Struge their arbitrator, and offering a sum of 17,000*l*. as compensation for his interest in the land, and requiring him to appoint an arbitrator on his behalf. By a notice dated the 5th of November, but served on the 8th of November, Lord Fitzhardinge appointed Mr. Branender as his arbitrator. On the 14th of November the two arbitrators were required to appoint an umpire; and on the 18th of November, under s. 27, they appointed Mr. Clutton sole umpire. He proceeded to act, and made his award for 16,400*l*. The 17,000*l*. offered by the company covered not only the claim, but also all costs which had been incurred up to the date of the offer.

In January, 1872, Lord Fitzhardinge's attorneys made out a bill of costs of the arbitration, and sent a copy to the company, and afterwards obtained an appointment to tax the same under s. 1 of 32 & 33 Vict. c. 18. The Master, however, refused to tax the bill, on the ground that the offer of 17,000*l*. having been made previously to the appointment of an arbitrator on behalf of Lord Fitzhardinge was made in sufficient time, and that, as the sum awarded was less than 17,000*l*., Lord Fitzhardinge was not entitled to the costs of the arbitration.

This rule was then obtained.

H. James, Q.C., and *W. G. Harrison*, shewed cause. The contention on behalf of the claimant is that the offer of 15,237*l*. on the 18th of August is irrevocable, and cannot be altered, and that the company are bound by that offer. But as the offer of 17,000*l*. was made before the appointment of the arbitrators, and therefore before any real litigation between the parties, that offer

1872

 FITZHARDINGE
 v.
 GLOUCESTER
 AND
 BERKELEY
 CANAL CO.

1872
FITZHARDINGE
v.
GLOUCESTER
AND
BERKELEY
CANAL CO.

was in time. By s. 34 of the Lands Clauses Consolidation Act, 1845, "All the costs of any such arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same, or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." Under s. 23, if the compensation claimed or offered shall exceed 50*l.* the party claiming compensation is entitled to have his claim settled by arbitration, provided he signify his desire to the promoters in writing, before they issue their warrant to the sheriff to summon a jury, stating in his notice the nature of his interest in respect of which he seeks compensation, and the amount of compensation claimed. By s. 38, "Before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned; and in such notice the promoters shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works." The proceedings before a jury are regulated by s. 51, which enacts that on every inquiry before a jury where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of the inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters one half of the costs of summoning of the jury, &c. . . . shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs. So that where the matter is to be settled by arbitration, the claimant has to state the amount claimed; but where the compensation is to be assessed by a jury, the company have to offer the sum which they are willing to give. The words in s. 34 are "shall have been offered," and make no limit as to time. The first time the company can make an offer after the proceedings by

way of arbitration have been resolved upon is, when they appoint their arbitrator, and that offer is practically the only offer made.

1872

FITZTHARDINGE
v.
GLOUCESTER
AND
BERKELEY
CANAL CO.

The Court then called upon

Hawkins, Q.C., and *Thesiger*, in support of the rule. First, under s. 1 of the Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), the Master has no discretion; it is imperative on him to tax the costs. The jurisdiction of the Master is simply to ascertain what are the costs of the inquiry and to settle the amount: he cannot receive evidence of any offer having been made. The mere taxation of costs does not confer a right to insist on the costs being paid; but when the taxation is concluded the claimant is at liberty to bring his action to enforce payment; the taxation is a preliminary to the party enforcing his legal rights. Formerly the costs were settled by the arbitrators under s. 34: *Gould v. Staffordshire Potteries Waterworks Co.* (1). But now by the Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), s. 1, they are to be taxed by the Master, and the duty imposed upon the Master is merely ministerial. Secondly. The company cannot withdraw the offer they first made of 15,237*l.*, and afterwards make another offer: In *Pearson v. Great Northern Ry. Co.* (2), it was held that an offer to be effectual must be made in the notice of an intention to issue a warrant to summon a jury, and that if the offer were made ever so short a time afterwards, and before any costs were incurred, it would be ineffectual, because the statute had pointed out the period when the offer must be made and the document in which it must be made. When the company initiated the proceedings by giving notice of their intention to summon a jury, the claimant sent in his claim of 28,000*l.* and then the company made him a formal offer of 15,236*l.* This offer was not made solely with a view of the compensation being assessed by a jury, but it was a general offer. The claimant then requires that the compensation shall be settled by arbitrators. After that the company were not entitled to withdraw the offer they had made and substitute another offer of 17,000*l.* It has been held that under s. 68, which applies to cases where lands have been injuriously

(1) 5 Ex. 214; 19 L. J. (Ex.) 281.

(2) See note at the end of the case.

1872
 FITZHARDINGE
 v.
 GLOUCESTER
 AND
 BERKELEY
 CANAL CO.

affected, amended offers may be made: *Hayward v. Metropolitan Ry. Co.* (1), *Metropolitan Ry. Co. v. Turnham* (2); but there is no decision that an offer once having been made a subsequent offer can be made, where the compensation is to be settled by arbitration. The litigation begins as soon as the company give a notice of their intention to issue a warrant to summon a jury under s. 38, and after the litigation has begun, the company are not at liberty to alter their offer. No doubt the course of procedure is changed: the tribunal by which the company desire to have the compensation assessed, viz., the jury, is changed to a tribunal by arbitration; but, nevertheless, the company are bound to give a notice once for all in which they shall state what amount they are willing to give by way of compensation, and they cannot, simply because the course of proceeding or tribunal is changed, amend that offer. The question is one which the claimant ought not to be precluded from taking to a court of error, and the Court ought therefore to grant the mandamus.

BLACKBURN, J. In this case the question is whether a mandamus should issue directing the Master to tax the costs of the arbitration; the Master has refused to tax the costs on the ground that the claimant is not entitled to costs.

I think that the Master has no discretion to refuse to tax costs, in a case in which it is proper that there should be a taxation; but I do not think that the statute intended to impose an obligation upon him to tax costs in a case in which the labour would be thrown away, and where the promoters would be put to useless expense, and in which if the costs were taxed the claimant would have no means of recovering them.

Then comes the question, whether or not the matter is so clear that we ought to decide it summarily on motion, without giving the claimant an opportunity of taking the opinion of a Court of error. In the first place the case, in my opinion, is very clear: and, secondly, a certain degree of mischief would arise if we allowed further litigation to go on.

I have come to a very decided opinion that the claimant is not

(1) 4 B. & S. 787; 33 L. J. (Q.B.) 73. 10 Jan H.S. 419
 (2) 14 C. B. (N.S.) 212; 32 L. J. (M.C.) 249.

entitled to his costs. The Lands Clauses Consolidation Act contemplates, by s. 23, that after the company have given the claimant notice to treat, and the amount of compensation cannot be agreed, the claimant may, if the claim is above 50*l.*, go to arbitration. The claimant, therefore, has the choice whether there shall be an arbitration or not. The 23rd section is in these terms, "If the compensation claimed or offered in any such case shall exceed 50*l.*, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly." There it is to be observed that the party taking the initiative, the claimant when he says, "I desire to have the amount of compensation assessed by arbitration," is required to state how much he claims in the notice that he gives. Accordingly the present claimant says, "I desire to go to arbitration, and to have the amount of compensation settled in that way, and I claim 28,000*l.*" The object of requiring him to state the amount of compensation he claims, I think, must be that the promoters may have an opportunity of considering whether they will pay him the amount he claims without arbitration, or whether they will offer him a smaller sum. Section 23 shews that the legislature contemplated that any offer that might be made by the promoters should be made after notice had been given by the claimant of an intention to go to arbitration, in which notice he must state the amount of compensation that he claims. But if the claimant does not desire arbitration, then there is another mode of proceeding: the company may issue a warrant to the sheriff to summon a jury, and with reference to that the 38th section of the Act is material. That section provides that, "Before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the

1872

FITZ HARDINGE
v.
GLOUCESTER
AND
BERKELEY
CANAL CO.

1872
FITZTHARDINGE
v.
GLOUCESTER
AND
BERKELEY
CANAL CO.

undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works." In this section, following exactly the scheme pointed out in s. 23, the party taking the initiative, the company, are required, when they give their notice, to state what sum they are willing to pay to the claimant, so that the claimant shall have an opportunity of considering and determining whether he will accept their offer or not. If he does accept it, then further litigation is dispensed with. But if he refuses their offer and inquiry proceeds, I think that the promoters and the claimant might fairly say, "Let us by mutual consent make another attempt to settle the matter by agreement," and if they do that I should say that the first notice, viz., that under s. 38, should be considered as cancelled. It may be, for anything I know to the contrary—I am not sure about it, and I do not think the question has ever been decided—that the promoters might send a notice and say, "We withdraw the notice we have given you of our intention to issue a warrant to the sheriff to summon a jury." Whether they would have a right to do that or not I do not know, but if they did, and the other side made no objection to it, I should say that the offer they had before made would be withdrawn also.

When the present offer of 17,000*l.* was made, it appears to me that the claimant could in no way have incurred any costs. If the inquiry went on, the offer which had been made before the warrant issued would be the final and conclusive offer, and it would be too late to make another offer afterwards. That was in fact the decision in *Pearson v. Great Northern Ry. Co.* (1) to which I was a party; but I do not think it at all follows that an offer once made, with a view to an inquiry before a jury, is to be considered final and conclusive; and that when the claimant requires compensation to be assessed by arbitration, instead of proceeding by a writ of inquiry, the company may not increase their offer up to the time when the arbitration fairly commences. The claimant might accept the increased offer if he thought it a reasonable sum; and he goes on, I think, at the peril of losing his costs.

(1) See note at the end of the case.

Taking that view of the matter, it seems to me that this rule ought to be discharged, because there is not sufficient doubt to allow the question to be further litigated. If there were a taxation of costs which the claimant had no right to receive, the promoters would be put to expense which they would have no means of recovering. But, at the same time, as this is a question which is said to be of importance, I think we ought to allow the writ to go, but only on the terms that the claimant will undertake on his part (and he may take a week to consider whether it is worth while to do so or not) that, in the event of his going on and failing, he will pay the costs of and incident to the taxation, unless afterwards he be held entitled to the costs by virtue of the judgment on the mandamus and return. If he will give such an undertaking, any hardship upon the promoters will be obviated, but unless he agrees to that, I think the rule ought to be discharged.

1872

FITZHARDINGE

v.

GLOUCESTER
AND
BERKELEY
CANAL CO.

MELLOR, J. I think it is quite clear that s. 34 contemplates that at some time an offer shall be made. When, then, ought that offer to be made? I think an offer is made in time if it is made at the time that notice is given of the appointment of an arbitrator. Where the promoters give notice of their intention to issue a precept to the sheriff to summon a jury, they are obliged to state in the notice the amount they are prepared to give for the land they require; but it is said that they have no power to withdraw that offer and make a fresh offer, although the claimant has required, as he is entitled to do, that the matter, instead of being determined by a jury, should be settled by arbitration. The claimant, by desiring that the compensation due to him should be assessed by arbitration, has abrogated the previous proceedings. When the character of the proceedings is changed, the promoters are justified in making another offer, and when they give notice of the appointment of their arbitrator, they are, I think, entitled to state what amount they are prepared to give as compensation, being then first brought into the position of litigants; and an offer made before the commencement of the arbitration is in sufficient time. I think, therefore, that this rule should be discharged. But, in order to give the claimant an opportunity of

1872 taking the opinion of a Court of error, the mandamus may issue—
FITZHARDINGE only, however, on the terms suggested by my Brother Blackburn.

GLOUCESTER
AND
BERKELEY
CANAL CO.

HANNEN, J. I agree that, subject to the conditions which have been specified, the claimant ought to have an opportunity of taking the opinion of a Court of error if he shall be so advised, and if it shall be thought that there is sufficient doubt about the matter to make it worth while to do so. But I do not entertain any doubt in the case. It appears to me that the offer of 17,000*l.* was made soon enough under the 34th section. By that section it is enacted that "all the costs of any such arbitration and incident thereto shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters." Now, no time is specified at which that offer must be made, but I think it is clear that the words "shall have been offered," mean offered at or before the commencement of the arbitration, for "all the costs of any such arbitration and incident thereto" are to be borne by the promoters. It follows, therefore, that they ought to make their offer at a time anterior to the incurring of any costs which the promoters may be liable to pay. And, if the offer is made at the very time when the arbitration commences, it follows that there cannot have been any costs incurred previous to the offer which would fall properly within the terms of the section. Here the arbitrator was appointed by a notice given on the 26th of October. I do not think it necessary to say more than that it appears to me that the time when notice is given of the appointment of the arbitrator is the beginning of the litigation. Practically it would make no difference, but on the 26th, two days after the appointment of an arbitrator by the promoters, notice is given of it, and an offer of 17,000*l.* is made, and after that another arbitrator is appointed. That would appear to me to be a sufficiently early time at which to make an offer. Is that offer invalidated by the fact that a previous offer had been made? I think it is clear that if the offer had been made formally by the representative of the promoters stating in writing that they would give a further sum, there is nothing in the Act of Parliament that would bind them to an offer made at a previous time; but they would

be at liberty, as it seems to me, to increase their offer up to the time of the beginning of the arbitration. Does it make any difference that the previous offer had been made with a view to the case being tried by a jury? It appears to me that it would make no difference. The first offer was made with reference to a different state of facts from those that existed at the time when the second offer was made.

I concur, therefore, in the opinion of my Brothers Blackburn and Mellor, that unless the terms which have been suggested are agreed to this rule should be discharged.

Rule absolute, upon the undertaking of Lord Fitzhardinge to pay the costs of the taxation in the event of it being finally decided that he is not entitled to the costs of the arbitration, otherwise rule discharged.

Attorneys for plaintiff: *Horn & Murray.*

Attorneys for defendants: *Hayes, Twisden, Parker, & Co.*

Q.B., Nov. 23, 1869. *Pearson v. Great Northern Railway Company.*

Rule calling upon the Great Northern Railway Company to shew cause why a mandamus should not issue directed to one of the Masters of the Court to tax the costs of an inquiry before the Sheriff of Middlesex, wherein Bella G. Pearson was the claimant, and the Great Northern Railway Company the defendants, touching the amount of compensation to be paid by the company to the claimant for the purchase of her interest in certain lands required for the execution of the works of the company.

On the 28th of July, 1868, the company sent to the claimant a notice under s. 18 of the Lands Clauses Consolidation Act, 1845, stating that certain lands belonging to her were required for the purposes of the company, and that they were willing to treat for the purchase of such lands. On the 27th of February, 1869, the claimant sent in a claim for 9702*l.*, and stated that she desired the compensation to be settled by a jury. In May, 1870, nothing having been done in the meantime, the claimant caused a writ of mandamus to issue to compel the company to issue their warrant to summon a jury, and immediately thereupon the company issued their warrant. Afterwards, on the 19th of May, the company offered 4000*l.* as compensation for the lands required by them. On the 31st of May the jury returned a verdict for the claimant of 4000*l.*

Hawkins, Q.C., and *Wills*, shewed cause.

Parry, Serjt., and *Dixon* were not heard in support of the rule.

1872

FITZHARDINGE
v.
GLOUCESTER
AND
BERKELEY
CANAL CO.

*Ans. L. 773
7012
16BD, 698*

1872

FITZHARDINGE
v.
GLOUCESTER
AND
BERKELEY
CANAL CO.

COCKBURN, C.J. Sect. 38 is the only section which provides that the promoters of the undertaking shall state the sum they are willing to give for lands sought to be purchased by them. And s. 51 makes the claimant's right to costs depend upon whether the verdict of the jury shall be given for a greater sum, or for the same or a less sum than the sum previously offered. Looking at the language of these two sections I think "the sum previously offered" in s. 51 means the sum that is to be offered under s. 38. The company have made no offer before they issued their warrant, as required by that section, and therefore the claimant is entitled to the costs of the inquiry.

BLACKBURN, J. I am also of opinion that, in the ordinary grammatical construction of the words in s. 51, "the sum previously offered" must mean the offer which is to be made under s. 38. In the present case the company never acted under s. 38, and the claimant is entitled to her costs.

MELLOR and LUSH, JJ., concurred.

Rule absolute.

END OF TRINITY TERM, 1872.

INDEX.

ACTION —Bankruptcy of plaintiff - - -	611	ADMISSION OF ATTORNEY — <i>continued.</i>	
<i>See</i> BANKRUPTCY OF PLAINTIFF.		examiners might be directed to admit the clerk in	
— Canal—Injury to mines - - -	244	Trinity Term, notwithstanding that he had not	
<i>See</i> DUTY OF CANAL OWNER.		renewed his notices, it was refused on the ground	
— Cause of - - -	573	that the Court required a strict compliance with	
<i>See</i> "CAUSE OF ACTION."		the above rule. <i>Ex parte</i> AN ARTICLED CLERK	[587
— Landowner—Duty - - -	31		
<i>See</i> DUTY OF LANDOWNER.		ADMITTANCE —Copyhold - - -	683
— Tort—Felony - - -	554	<i>See</i> DEVISE OF COPYHOLDS.	
<i>See</i> FELONY.			
ADJOINING OCCUPIERS —Duty of - - -	661	ADULTERATION OF BREAD — <i>Conviction under</i>	
<i>See</i> DUTY OF ADJOINING OCCUPIERS.		6 & 7 Wm 4, c. 37, for using a certain mixture in the	
ADMIRALTY COURT JURISDICTION — <i>Cause for</i>		<i>making of Bread—Guilty Knowledge.</i>] The appel-	
<i>Necessaries under 24 Vict. c. 10, s. 5—Owner domi-</i>		lant, a baker, was convicted under s. 8 of 6 & 7	
<i>ciled in England—Prohibition.</i>] By 24 Vict. c. 10,		Wm. 4, c. 37, for using a certain mixture or in-	
s. 5, "the High Court of Admiralty shall have		gredient, to wit, alum, in making bread for sale.	
jurisdiction over any claim for necessaries supplied		At the hearing it was proved that he sold a loaf	
to any ship elsewhere than in the port to which the		adulterated with alum; but no evidence was ad-	
ship belongs, unless it is shewn to the satisfaction		dulced tending to prove knowledge on the part of	
of the Court that, at the time of the institution of		the appellant or of the servant who made the	
the cause, any owner or part owner of the ship is		bread that alum was used in the loaf:— <i>Held,</i>	
domiciled in England or Wales . . ."—By 31		that, to constitute the offence under the above	
& 32 Vict. c. 71, s. 3, subs. 2: Any county court		section, there must be a guilty knowledge, and that	
having Admiralty jurisdiction has jurisdiction as to		the conviction was wrong. <i>CORE v. JAMES</i>	135
necessaries up to 150 <i>l.</i> —A ship being in the			
port of B., which was not the port to which she		AFFIDAVIT —Bill of sale - - -	157, 700
belonged, a suit was instituted in the county		<i>See</i> AFFIDAVIT WITH BILL OF SALE. 1, 2.	
court for necessaries supplied to her at B., and the		AFFIDAVIT WITH BILL OF SALE — <i>Description</i>	
ship was arrested the same day, and judgment was		<i>of Residence of Grantor in Affidavit, under 17 &</i>	
given for the amount claimed. Afterwards the		<i>18 Vict. c. 36, s. 1.]</i> In the affidavit filed under	
owner, who was abroad, but was a British subject		17 & 18 Vict. c. 36, s. 1, with a copy of a bill of	
domiciled in England, applied to the judge of the		sale, the deponent stated "that the paper writing	
county court to stay proceedings, and was refused.		hereunto annexed is a true copy of a bill of sale	
A motion was then made for a prohibition:—		made by Isaac Anthony," and "that the said	
<i>Held,</i> that, in order to deprive the Admiralty		Isaac Anthony resides at Dynevor Lodge, and is	
Court of the jurisdiction given to it, it must be		an auctioneer." By the copy of the bill of sale	
shewn to the Court before the Court pronounced		annexed to the affidavit, Isaac Anthony was de-	
judgment that the owner was domiciled in Eng-		scribed as "of Dynevor Lodge, in the parish of	
land. <i>Ex parte</i> MICHAEL - - -	658	Llanarthney, in the county of Carmarthen, auc-	
ADMISSION OF ATTORNEY — <i>Admission—Ren-</i>		tioner," which was the true residence:— <i>Held,</i>	
<i>ewal of Notice R. (Att.) H. T. 1853, s. 6.]</i> An		that the description in the affidavit of the resi-	
articled clerk had passed his final examination for		dence of the person making the bill of sale was	
admission as an attorney in Easter Term, and had		not sufficient, but that the copy of the bill of sale,	
given all the notices to entitle him to be admitted		in which the situation of the residence was stated	
in that term; but being in his principal's service		with particularity enough to guide any inquiry	
he did not apply for admission till Trinity Term,		as to the identity of the individual, might be re-	
and the notices for his admission in that term had		ferred to, in order to explain and supplement the	
not been renewed pursuant to R. (Att.) H. T.		description given by the affidavit; and that, there-	
1853, s. 6. A motion having been made that the		fore, the provisions of the statute were satisfied.	
VOL. VII.—Q. B.	3	<i>JONES v. HARRIS</i> - - -	157
	M		1

AFFIDAVIT WITH BILL OF SALE—continued.

2. —Description of Occupation of Maker and of Attesting Witness—"Government Clerk"—"Insurance Clerk"—17 & 18 Vict. c. 36, s. 1.] In the affidavit of the execution of a bill of sale filed under 17 & 18 Vict. c. 36, s. 1, the maker was described as "government clerk;" he was a clerk in the Admiralty:—*Held*, that the description was sufficient.—*See*, that "insurance clerk" was sufficient description of the occupation of the attesting witness. *GRANT v. SHAW* - - - 700

AFTER-ACQUIRED PROPERTY—Licence to seize

—Bankruptcy - - - 527

See LICENCE TO SEIZE GOODS.

AGENT—Broker—Conversion - - - 616

See CONVERSION.

—Charterparty—Ceasing of liability - 509

See CEASING OF LIABILITY ON CHARTER.

—Custom of trade - - - 126

See CUSTOM OF MARKET.

—Payment by undisclosed principal - 598

See PAYMENT TO AGENT BY PRINCIPAL.

ALEHOUSE—Licence - - - 482, 487, 490

See LICENCE TO ALEHOUSE. 1, 2, 3.

AMMUNITION—Gunpowder - - - 61

See GUNPOWDER. 1.

APPEAL—Quarter sessions - - - 16

See BASTARDY. 1.

—Quarter sessions - - - 288

See APPEAL TO QUARTER SESSIONS.

APPEAL AGAINST RATE—Poor-rate—Appeal governed by local Act, though valuation made under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67)—Effect of want of Notice of new Assessment under s. 9.] A metropolitan parish was regulated by a local Act, under which a rate for the relief of the poor and other parish purposes was to be made by the vestrymen, and any person aggrieved by the rate was to apply to the guardians for relief, and if dissatisfied with their decision, might then appeal to the quarter sessions, giving notice to the guardians. A valuation list for the parish was made by the overseers and finally settled by the assessment committee under 32 & 33 Vict. c. 67, in which certain property occupied by the appellants was newly assessed, but no notice was given to them by the overseers as required by s. 9. The appellants appealed direct to the quarter sessions, proceeding as in an appeal against a poor-rate under the general Act, 17 Geo. 2, c. 38:—*Held*, that the rate was still made under the local Act, though the valuation was to be in conformity with the valuation list under 32 & 33 Vict. c. 67; and that the proceedings not having been in conformity with the local Act the quarter sessions had no jurisdiction.—*Quære*, whether the valuation list was binding on the appellants, they not having had the notice required by s. 9 of 32 & 33 Vict. c. 67. *THE QUEEN v. THE JUSTICES OF MIDDLESEX* - - - 653

APPEAL TO QUARTER SESSIONS—Poor-law Amendment Act, 1867 (30 & 31 Vict. c. 106) s. 27—Order of Removal, Appeal against, to what Sessions.] By 30 & 31 Vict. c. 106, s. 27, where a union extends into several distinct jurisdictions, every matter, act, charge, or complaint by which the guardians thereof are affected, or in which they have any interest, shall for the purpose of

APPEAL TO QUARTER SESSIONS—continued.

jurisdiction be deemed to arise or exist equally throughout the union. A Poor Law Union included the township of B., situate in the county of S., and the parish of W., situate in the borough of W., which has a recorder and separate quarter sessions. Two justices of the borough, by virtue of s. 27 of 30 & 31 Vict. c. 106, made an order removing a pauper residing in the township of B. to the place of his last settlement:—*Held*, that the appeal against the order was governed by and dependent upon the jurisdiction of the justices by whom the order was made, and that the appeal was therefore to the borough sessions and not to the county sessions. *THE QUEEN v. THE JUSTICES OF STAFFORDSHIRE* - - - 288

APPROPRIATION ACT—Mandamus - 387

See MANDAMUS TO SERVANTS OF CROWN.

APPROPRIATION OF PENALTIES—Metropolitan

Police District—Jurisdiction as to Penalties of Two Justices sitting in District—Receiver of Police District—2 & 3 Vict. c. 71, s. 47; 3 & 4 Vict. c. 84, s. 6.] By 2 & 3 Vict. c. 71, s. 47, "When by any Act penalties or shares of penalties are or shall hereafter be made recoverable in a summary manner before any justices of the peace, and by the Act the same are or shall be limited to the Queen, or some person other than the informer or party aggrieved, in every such case the same, if recovered or adjudged before any of the said" [metropolitan police] "magistrates, shall be received for and adjudged to be paid to the receiver" [of the metropolitan police district] "for the time being." By 3 & 4 Vict. c. 84, s. 6, any two justices having jurisdiction within the metropolitan police district shall have, while sitting together publicly in the petty sessions court or room, except in divisions assigned to the police courts, all the powers, privileges, and duties which any one magistrate of the police courts has by 2 & 3 Vict. c. 47 and 71:—*Held*, that this did not make penalties, which were recovered before two justices sitting as above, penalties recovered before a police magistrate; and that therefore the shares of such penalties appropriated to the informer or party aggrieved did not go to the receiver of the metropolitan police district. *THE RECEIVER FOR THE METROPOLITAN POLICE DISTRICT v. BELL* - - - 433

ARTICLED CLERK—Binding to Two Partners—

Enrolment of Articles 6 & 7 Vict. c. 73, s. 8.] A clerk may be articulated to more than one member of a firm of attorneys. *In re HOLLAND* - - - 297

—Admission—Notice - - - 587

See ADMISSION OF ATTORNEY.

ASSESSMENT—Rates—Deduction - - - 64

See NECESSARY EXPENSE TO COMMAND RENT.

ASSESSOR—Town councillor—Disqualification [209

See DISQUALIFICATION FOR TOWN COUNCILLOR.

ASSIGNMENT OF LEASE—Covenant for title [Ex. Ch. 144

See COVENANT FOR TITLE.

ASSIGNMENT OF POLICY—Marine Insurance—

Assignment after Loss—Right of Assignee to sue in his own Name—31 & 32 Vict. c. 86, s. 1.] A policy

ASSIGNMENT OF POLICY—*continued.*

of marine insurance can be assigned, under 31 & 32 Vict. c. 86, s. 1, after loss, so as to entitle the assignee to sue upon it in his own name.—In an action upon a policy of marine insurance by the executors of E., deceased, against an underwriter, the declaration alleged that a policy of insurance on goods in a ship was underwritten by the defendant, that the goods were lost by the perils insured against, and that after the loss “the said policy of insurance, together with all rights accrued under and by virtue thereof, was, by the assured, for good consideration duly assigned to E. in his lifetime”:—*Held*, on demurrer, that although the assignment was made after loss of the goods, yet as the policy, “together with all rights accrued under it” had been duly assigned to E., he became “entitled to the property thereby insured,” within the terms of 31 & 32 Vict. c. 86, s. 1, and was entitled to sue upon the policy in his own name, and that the declaration was good. *LOYD v. FLEMING. LLOYD v. SPENCE* - 299

ATTORNEY—Admission - - - 587

See *ADMISSION OF ATTORNEY.*

—Articled clerk - - - 297

See *ARTICLED CLERK.*

—Lien—Judgment - - - 499

See *SOLICITOR'S LIEN.*

AUCTION—Distress—Money paid - - 310

See *AUCTIONEER'S AUTHORITY.*

AUCTIONEER'S AUTHORITY—*Auction, Sale by—Rent in Arrear, Liability of Auctioneer to pay—Distress on Goods after Sale.* Defendant, an auctioneer, sold certain goods for plaintiff, the owner, on premises occupied by plaintiff and another, and in respect of which the latter owed the landlord rent. By the conditions of sale each lot was to be taken to be delivered at the fall of the hammer, after which time it was to remain at the exclusive risk of the purchaser. After the sale, and before the goods were removed, the landlord threatened to distrain on the goods, whereupon the auctioneer paid the rent, and deducted it from the amount the goods had realized, and paid over the balance to the plaintiff:—*Held*, that the auctioneer was not justified, as against the plaintiff, in paying the rent, as, on the sale of each lot, the property passed to the purchaser, who would have had to bear the loss if the landlord had distrained. *SWEETING v. TURNER* 310

BAILOR AND BAILEE—Title of bailee - 594

See *TITLE OF BAILEE.*

BANKRUPTCY—Cause of action—Passing to trustee - - - 611

See *BANKRUPTCY OF PLAINTIFF.*

—Licence to seize goods - - - 527

See *LICENCE TO SEIZE GOODS.*

—Set-off - - - 34

See *SET-OFF.*

BANKRUPTCY OF PLAINTIFF—*Action—Bankruptcy—Pecuniary Loss.* Declaration against defendants for a breach of duty as attorneys in not getting the best price for the equity of redemption in premises of plaintiff intrusted to defendants for sale. That defendants well knew that if plaintiff did not obtain a reasonable price, the bankruptcy of plaintiff would be the necessary and inevitable consequence, and that in consequence

BANKRUPTCY OF PLAINTIFF—*continued.*

of defendants' breach of duty plaintiff was adjudged a bankrupt. Plea: the bankruptcy of plaintiff under the Act of 1869, and that the causes of action passed to the assignee. On demurrer:—*Held*, by Blackburn, Mellor, and Lush, JJ., on the authority of *Hodgson v. Sidney* (Law Rep. 1 Ex. 313) that bankruptcy was a good defence, and that the averment that defendants knew that bankruptcy would ensue made no difference. Hannen, J., doubting whether *Hodgson v. Sidney* was not distinguishable on that ground. *MORGAN v. STEBLE* - 611

BASTARDY—*Decision of Quarter Sessions on Appeal Final*—7 & 8 Vict. c. 101, ss. 2-4; 8 Vict. c. 10, s. 6.] Where on appeal to quarter sessions an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence, as required by 8 Vict. c. 10, s. 6, the order of quarter sessions is a decision on the merits, and is final, and fresh proceedings cannot be taken before justices. *THE QUEEN v. GLYNNE* - 16

—*Jurisdiction—Evidence of Mother—Death before Hearing.* A bastardy order cannot be made without the mother of the child being examined as a witness on the hearing.—Where, therefore, the mother died after the issue of the summons, but before the hearing:—*Held*, that there was no jurisdiction to make an order. *THE QUEEN v. ARMITAGE* - 773

BILL OF LADING—Construction—Steamship
See “*STEAMSHIP.*” [566]

BILL OF SALE—Affidavit - - 157, 700

See *AFFIDAVIT WITH BILL OF SALE.* 1, 2.

—Licence to seize—Bankruptcy - 527

See *LICENCE TO SEIZE GOODS.*

BLACK SMOKE—“Nuisance” 474, 537, 545

See *SMOKE.* 1, 2, 3.

BLOCKADE—Charterparty—Breach .. 404

See *BREACH OF DUTY BY SHIPOWNER.*

BOARD OF HEALTH—Owner - - 26

See “*OWNER.*” 2.

BREACH OF COVENANT—Forfeiture—Waiver

See *WAIVER OF FORFEITURE.* [Ex. Ch. 344]

BREACH OF DUTY BY SHIPOWNER—*Contract,*

Justification of Refusal to Perform—Charterparty

—*Blockade—Restraint of Princes.* Declaration:

That by a charterparty it was agreed that defendants' vessel should, with all convenient speed, sail to a spout as directed by plaintiffs, and there load a full cargo of coals; and then, as soon as wind and weather should permit, should proceed to Hamburg, and there deliver the same, the restraint of princes and rulers (*inter alia*) excepted. That plaintiffs did, and were ready to do, all that was necessary on their parts; but defendants, before any breach by plaintiffs of the charterparty, refused to carry out the charterparty, and to let their ship take or carry any goods of plaintiffs to the port of Hamburg, and gave notice to plaintiffs that they renounced the charterparty.—Pleas: 5. That before any breach of the charterparty, war broke out between France and Germany, wherein the port of Hamburg was situate; that the said port was blockaded by the French fleet; that the Queen, by proclamation, enjoined her subjects to a strict neutrality, and not to commit any violation of the law of nations; that the defendants were British subjects, and their ship was a British ship,

BREACH OF DUTY BY SHIPOWNER—*continued.*

and the cargo being a cargo to be carried to Hamburg, the further performance of the charterparty became illegal, and the defendants, as they lawfully might, refused to carry out the same. 6. Repeating the above allegations, that defendants having notice of the premises, refused to allow the ship to receive a cargo for the purpose of running the blockade and delivering the cargo, which was the breach complained of. 7. Repeating the same allegations, that defendants were ready to perform the charterparty so far as they were not prevented by any of the excepted causes; but that the charterparty could not have been carried out within a reasonable time, except by running the blockade, wherefore defendants refused to carry out the charterparty.—On demurrer:—*Held*, that the pleas disclosed substantially a good defence; but that the charterparty being for one single adventure to commence at once, and the contract being still executory, the defendants were justified in throwing up the contract and refusing to load the ship, when the further performance of the contract within a reasonable time was prevented by an excepted cause, viz., the blockade, which was a "restraint of princes." *GEIPEL v. SMITH* - 404

BREAD—Adulteration - - - 135

See ADULTERATION OF BREAD.

BREAK OF RESIDENCE—Poor—Removal 467

See IRREMOVABILITY OF POOR.

BRIDGE—Collection of water—Nuisance - 52

See "NUISANCE."

BRITISH SUBJECT ABROAD—Writ - 573

See "CAUSE OF ACTION."

BROKER—Conversion - - - 616

See CONVERSION.

— Custom of trade - - - 126

See CUSTOM OF MARKET.

CANAL—Injury to subjacent mines - 244

See DUTY OF CANAL OWNER.

CARGO—Loading of—Ceasing of liability on charter - - - 509

See CEASING OF LIABILITY ON CHARTER.

— Sale—"Expected to arrive" - *Ex. Ch.* 139

See CARGO "EXPECTED TO ARRIVE."

— Ship—Duty of master - - *Ex. Ch.* 225

See DUTY OF MASTER OF VESSEL.

CARGO "EXPECTED TO ARRIVE"—*Contract of Sale.* The defendants' correspondents at Valparaiso bought on their account of S. & Co. 600 tons of nitrate of soda, and on the 16th of July, 1868, they chartered the bark *Precursor* to bring it to England, and they, on the same day, wrote to the defendants of this. On the receipt of the advice, the defendants, on the 8th of September, made a contract, through brokers, with the plaintiff: "We have this day sold to you about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12s. 9d. per cwt. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." In the mean time, on the 13th of August, an earthquake had destroyed the greater part of the nitrate of soda while lying at the port of lading: and, it having been determined by arbitration, pursuant to the contract,

CARGO "EXPECTED TO ARRIVE"—*continued.*

that S. & Co. were not bound to supply other soda, on the 2nd of September the Valparaiso house had cancelled the charter of the *Precursor*. Afterwards, on learning from the defendants that they had sold the nitrate of soda to arrive, but not on what terms, they purchased other 600 tons of nitrate of soda at above the defendants' limit, and obtained a transfer of a charter of the same bark *Precursor*, and shipped the nitrate about the 23rd of December to the defendants, to enable them to execute their contract, if obliged to do so, or to sell at a profit, if free. The *Precursor* arrived in England on the 8th of May, 1869, and the plaintiff demanded the cargo under the contract of the 8th of September:—*Held*, affirming the judgment of the Court of Queen's Bench, that the plaintiff was not entitled to the cargo. *SMYTH v. MYERS*. - - - *Ex. Ch.* 139

CARRIER—Insurance - - - 78

See INSURANCE BY CARRIERS.

CASE—*Burgess v. Eve* (Law Rep. 13 Eq. 450)

approved - - - 661

See DISCHARGE OF SURETY. 1.

— *Ex parte Cleland* (Law Rep. 2 Ch. 808)

commented upon - - - 499

See SOLICITOR'S LIEN.

— *Ferrar v. London Commissioners of Sewers* (Law Rep. 4 Ex. 1) approved *Ex. Ch.* 148

See COMPENSATION UNDER LANDS CLAUSES ACT.

— *Fletcher v. Rylands* (Law Rep. 3 H. L. 330) distinguished - - - 31

See DUTY OF LANDOWNER.

— *Hodgson v. Sidney* (Law Rep. 1 Ex. 313)

followed - - - 611

See BANKRUPTCY OF PLAINTIFF.

— *Humfrey v. Dale* (7 E. & B. 260: E. B. & E. 1004) followed - - - 126

See CUSTOM OF MARKET.

— *Lyde v. Mynn* (4 Sim. 505; 1 M. & K. 683) distinguished - - - 527

See LICENCE TO SEIZE GOODS.

— *Purdy v. Smith* (1 E. and B. 511) dissented from - - - 285

See "TAXED CART."

— *Reg. v. Hull Docks* (18 Q. B. 325; 21 L. J. (N.S.) 153) distinguished - - - 643

See DOCKES.

— *Rez v. Bilston* (5 B. & C. 851) discussed 334

See SURFACE LANDS.

— *Spencer v. Marriott* (1 B. & C. 457) followed *Ex. Ch.* 316

See COVENANT FOR QUIET ENJOYMENT.

CATTLE—Toll—Market - - - 328

See MARKET TOLLS.

"CAUSE OF ACTION"—*Practice—Summons under s. 18 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76)—British Subject residing without the Jurisdiction—Cause of Action.* The plaintiff and the defendant, both British subjects, being in Germany, became engaged to marry. The plaintiff came to England, and there received a letter written and posted by the defendant in Germany, in which she declined to carry out her engagement. The plaintiff sued out a writ of summons under s. 18 of the Common Law Pro-

"CAUSE OF ACTION"—continued.

cedure Act, 1852 :—*Held*, that the words "cause of action," in the above section, mean the whole cause of action, and do not apply where a contract has been made out of the jurisdiction and the breach has occurred in England.—*Sichel v. Borch* (2 H. & C. 954), and *Allhusen v. Maltgarejo* (Law Rep. 3 Q. B. 340), adhered to; *Jackson v. Spittall* (Law Rep. 5 C. P. 542) dissented from :—*Held*, also, that the breach of the contract to marry occurred in Germany, the receipt of the letter only furnishing evidence of the breach and not constituting the breach itself. *CHERRY v. THOMPSON* - - - - - 573

— *Landowner* - - - - - 31

See DUTY OF LANDOWNER.

— Passing to trustee—Bankruptcy - 611

See BANKRUPTCY OF PLAINTIFF.

CEASING OF LIABILITY ON CHARTER—

Charterparty, Construction of—Clause as to ceasing of Agent's Liability on loading of Cargo.] By a charterparty between plaintiff and defendant it was agreed that plaintiff's ship should, with all convenient speed, proceed to Sunderland, and that defendant should there load the ship in regular turn with a full cargo of coals, and the ship should proceed with it to Kiel, and deliver it to freighter or assigns, on payment of certain freight; "and that, the charter being concluded by defendant on behalf of another party resident abroad, all liability of defendant should cease as soon as he had shipped the said cargo" :—*Held*, that this clause only exempted defendant from liability accruing after the loading of the cargo; and that he, therefore, remained liable for delay in loading, although he had ultimately loaded a full cargo. *CHRISTOFFERSEN v. HANSEN* - 509

CHARTERPARTY—Breach—Blockade - 404

See BREACH OF DUTY BY SHIPOWNER.

— Ceasing of liability - - - - - 509

See CEASING OF LIABILITY ON CHARTER.

CLIPPINGS OF TREES—Negligence - 31

See DUTY OF LANDOWNER.

COLLECTION OF WATER—Bridge—"Nuisance"

See "NUISANCE." [550]

— Escape - - - - - 661

See DUTY OF ADJOINING OCCUPIERS.

COMMENCEMENT OF POLICY—A Marine Insurance—Construction of Policy—"To commence at and from loading at, as above," how far qualified by other terms of Policy—Re-insurance.]

Defendants underwrote a policy of insurance for 1000*l.*, declared to be upon cargo, being a re-insurance subject to all clauses and conditions of the original policy, in the ship *Daybreak*, at and from any port or ports in any order on the west coast of Africa to the vessel's port of discharge in the United Kingdom; the insurance "to commence from the loading of the goods at as above." By the original policy the insurance was for 1000*l.* upon the cargo valued at 3350*l.* of the said vessel *Daybreak*, at and from Liverpool to any ports in any order backwards and forwards on the coast of Africa, and thence back to a port of discharge in the United Kingdom; with leave to increase the valuation of the cargo on the homeward voyage; outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port

COMMENCEMENT OF POLICY—continued.

of discharge. Goods, shipped at Liverpool, were lost by perils insured against more than twenty-four hours after the vessel had arrived at her first port of discharge on the coast of Africa :—*Held*, that the clause of the policy declared upon, that the insurance was to commence on the loading of the goods at as above, viz., a port on the coast of Africa, must be taken as qualified by the clause in the original policy, that outward cargo was to be considered homeward interest twenty-four hours after the ship's arrival at her first port of discharge; and that the policy had therefore attached. *JOYCE v. THE REALM MARINE INSURANCE COMPANY* - - - - - 580

2. — *Marine Insurance—Construction of Policy on Freight—"From B. Island to Port of Discharge, the Insurance on said Freight beginning from the loading of said Vessel."*] The plaintiffs caused themselves to be insured with the defendants, "lost or not lost, in 500*l.*, upon the freight payable to them in respect of this present voyage to be performed by the vessel *Napier* from Baker's Island to a port of discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel. Being a reinsurance to be paid as on original policy." The plaintiffs had underwritten a policy on chartered freight of a cargo of guano, from Baker's Island, while there, and thence to a port in England. The vessel arrived at Baker's Island, and had taken in two-thirds of her cargo, a full cargo being ready, when she was wrecked. The plaintiffs, having paid upon a total loss, sought to recover it from the defendants :—*Held*, that the risk had not attached.—By Blackburn, J., on the ground that the clause, "the insurance on the said freight beginning from the loading of the said vessel," did not extend the insurance beyond the other part, "from Baker's Island," but only shewed that defendants did not intend to be liable unless the goods were on board. By Mellor and Lush, JJ., on the ground, that the later words did extend the previous clause and made the risk begin earlier, but that "from the loading" meant from the completion of the loading. *JONES v. THE NEPTUNE MARINE INSURANCE CO.* - 702

COMMON—Compensation - - - - - 1

See COMPENSATION UNDER LANDS CLAUSES ACT. 2.

COMPENSATION—Canal—Injury to mines 244

See DUTY OF CANAL OWNER.

— Lands Clauses Act - 1, 728, 776, Ex. Ch. 148

See COMPENSATION UNDER LANDS CLAUSES ACT. 1, 2, 3, 4.

COMPENSATION UNDER LANDS CLAUSES ACT

— *Lands Clauses Consolidation Act, 1845*, (8 Vict. c. 18), s. 68, *Effect of, to give Compensation—Construction of special Act consolidating Lands Clauses Consolidation Act.*] When the entire Lands Clauses Consolidation Act, 1845, is incorporated in a special Act, no other enactment is required, beyond s. 68, to confer the right to compensation for lands injuriously affected by the works under the special Act. *Ferrar v. London Commissioners of Sewers* (Law Rep. 4 Ex. 1), on this point affirmed. By the Chelsea Improvement Act, 1845 (8 & 9 Vict. c. cxliii.), s. 83, "so much of the Lands Clauses Consolidation Act, 1845, as

COMPENSATION UNDER LANDS CLAUSES ACT

—continued.

is applicable, and is not modified or is not inconsistent with the provisions hereof, shall apply to the improvements authorized by this Act to be made, and shall be read as forming part of this Act." By s. 104 the commissioners under the Act may, subject to the provisions of the Act, alter the level of streets, nothing being said as to compensation. By ss. 124 and 127 the commissioners may remove from houses projections into the street which were existing at the passing of the Act, and also, on the rebuilding of projecting houses, set them back to the line of the street, with a proviso that the commissioners shall make compensation to the owner, &c., in either case. The commissioners, by raising the level of a street under s. 104, impeded access to the house of which the prosecutor was lessee, and so injuriously affected it:—*Held*, affirming the judgment of the Court of Queen's Bench, that the lessee of the house was entitled to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845; and that the fact of compensation being expressly given in cases under ss. 124 and 127 of the Local Act was not inconsistent with the intention that it should be given in cases within s. 104, by virtue of the general enactment in s. 68 of the Lands Clauses Consolidation Act. *THE QUEEN v. THE VESTRY OF ST. LUKES, CHELSEA* **Ex. Ch. 148**

2. — *Lands Clauses Consolidation Act, 1845* (8 *Vict. c. 18*), ss. 99–107, *Compensation to Commoners under—Remedy by Commoners, when Land occupied without Payment of Compensation.* Under ss. 99–107 of the Lands Clauses Consolidation Act if a railway company take possession, by virtue of their Act, of land over which there are rights of common, after payment to the lord of the manor of compensation in respect of his ownership in the soil and a conveyance by him to the company, and they construct their railway on the land without having first paid compensation to the commoners in respect of their rights of common, a commoner may maintain an action against the company for the disturbance of his rights of common. *STONEHAM v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY* - - - **1**

3. — (8 *Vict. c. 18*), s. 34—*Lands Clauses Consolidation Act, 1869* (32 & 33 *Vict. c. 18*), s. 1—*Compensation—Amount offered—Taxation of Costs.* A canal company requiring to purchase the claimant's land, received a notice from the claimant, claiming 28,000*l.* as compensation. On the 18th of August, the company, under s. 38 of the Lands Clauses Consolidation Act, gave the claimant notice of their intention to issue their warrant for summoning a jury, and offering 15,237*l.* as the sum they were willing to give. On the 28th of August the claimant gave the company notice, under s. 23, of his desire to have the compensation settled by arbitration. On the 26th of October the company gave the claimant notice that they had appointed an arbitrator, and offered 17,000*l.* as compensation. On the 8th of November the claimant appointed an arbitrator. On the 18th of November the two arbitrators appointed an umpire. The umpire awarded the claimant 16,400*l.*:—*Held*, that the offer of 17,000*l.*, having been made when the first arbitrator was

COMPENSATION UNDER LANDS CLAUSES ACT

—continued.

appointed and before the beginning of the arbitration, was a good offer, and was not invalidated by the previous offer of 15,237*l.*; and the sum awarded being a less sum than 17,000*l.*, the claimant was not entitled to the costs of the arbitration, under s. 34. The master is not bound, under s. 1 of the Lands Clauses Consolidation Act, 1869, to tax the costs of an arbitration unless the claimant is entitled to costs under s. 34 of the Lands Clauses Consolidation Act, 1845. *FITZTHARDINGE v. GLOUCESTER AND BERKELEY CANAL CO.* - - - **776**

4. — (8 *Vict. c. 18*), ss. 38–50—*Value of Lands purchased, and Compensation for Injury to Lands therewith*—"By severing or otherwise injuriously affecting." The plaintiffs, a volunteer corps, had obtained leases of pieces of ground, on which they had formed a rifle range of 800 yards, and had built butts. Immediately behind the butts was marsh land in the occupation of A., and beyond that some marsh meadows. In order to provide for the safe passage of bullets passing beyond the butts, the plaintiffs had obtained a lease of the meadows; but as to A.'s land, they had only a verbal agreement, under which they paid A. 49*l.* per annum as an agreed commuted payment or compensation for any injury done to the cattle on the land in the course of shooting at the butts, and it was open to either party to discontinue the arrangement at any time on giving a proper notice. The defendants, a gas company, under their Act, were empowered to take compulsorily part of the meadows leased to plaintiffs for the formation of a road to defendants' works, and the formation and use of this road rendered it impossible to use the rifle range, and it was accordingly abandoned by plaintiffs. Proceedings were taken under the Lands Clauses Consolidation Act, 1845 (8 *Vict. c. 18*), ss. 38–50, before a jury, to assess the compensation to plaintiffs for the land taken by defendants, and for the severance or otherwise injuriously affecting the other land of the plaintiffs; under the latter head they claimed compensation for the stoppage of the rifle range. The jury, under s. 49, assessed compensation under both heads. The defendants disputed their liability to pay the latter sum, on the ground that there had been no actual severance of the land taken from the rifle range, by reason of the plaintiffs having only a precarious interest over A.'s land:—*Held*, that the plaintiffs were entitled to this head of compensation; and that the fact that plaintiffs had only a precarious right of shooting over A.'s land only went to the quantum of compensation which the jury might think right to award. *HOLT v. THE GAS LIGHT AND COKE COMPANY* - - - **728**

CONCEALMENT OF MATERIAL FACTS—*Marine Insurance*—"Slip"—*Policy.* Where underwriters have (as by initialing a slip) made a contract of assurance, which, although invalid at law and in equity for want of statutory requisites, is nevertheless, in practice, and according to the usage of those engaged in marine insurance, a complete and final contract binding upon them in honour and good faith whatever events may subsequently happen, the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against;

CONCEALMENT OF MATERIAL FACTS—cont.

and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed. *Cory v. Patton* - - - - - 304

— Surety - - - - - 666

See DISCHARGE OF SURETY. 1.

CONTAGIOUS DISEASES (ANIMALS) ACT, 1869

See JUSTICES' JURISDICTION. 2. [416

CONTRACT—Charterparty—Breach - 404

See BREACH OF DUTY BY SHIPOWNER.

— Custom of trade - - - - - 126

See CUSTOM OF MARKET.

— Guarantee - - - - - Ex. Ch. 196

See FRAUDS, STATUTE OF.

— Undisclosed principal—Payment to agent [598

See PAYMENT TO AGENT BY PRINCIPAL.

CONVERSION—Trove—Broker.] The plaintiffs sued the defendants, cotton brokers, in an action of trover, to recover the value of thirteen bales of cotton. The cotton was fraudulently bought by B. from the plaintiffs' brokers; the defendants, without notice of any fraud, bought, in their own name as principals, the cotton from B., and afterwards sold it to M. at the same price at which they had bought it, charging a commission. The defendants obtained B.'s signature to a delivery order, and took delivery of it from B.'s warehouse and conveyed it to a railway station, whence it was forwarded to M., by whom it was spun into yarn. The defendants in buying the cotton intended to act as brokers, believing the cotton would suit M. Afterwards the plaintiffs demanded the cotton from the defendants. The jury found that the cotton was bought by the defendants as agents in the course of their business as brokers, and that they dealt with it only as agents to their principal:—*Held*, by Martin, Channell, and Cleasby, BB., affirming the judgment of the Queen's Bench, that the defendants were liable to the plaintiffs in trover for the value of the cotton; Kelly, C.B., Byles and Brett, JJ., dissenting.—By Martin and Channell, BB., that the defendants having bought the cotton as principals from B., it was immaterial that they intended to deal with it only as agents to their principal; and that whoever deals wrongfully with the goods of another is equally liable whether he be agent or principal.—By Cleasby, B., that by reason of the real principals not being known, and therefore not disclosed at the time the bargain was made, the defendants necessarily became the parties to the contract until the real principals being ascertained were adopted by the sellers, and by their dealing with the cotton became liable for a conversion. *Fowler v. Hollins* - - - - - Ex. Ch. 616

COPYHOLD—Devise - - - - - 683

See DEVISE OF COPYHOLD.

CORONER—Salary - - - - - 207

See COUNTY CORONER.

CORPORATION—Election—Disqualification 209

See DISQUALIFICATION FOR TOWN COUNCILLOR.

— Foreign—Service of writ - - - 293

See FOREIGN CORPORATION.

— of Oxford—"Resident" - - - 471

See "RESIDENT."

COSTS—Compensation—Taxation - - - 776

See COMPENSATION UNDER LANDS CLAUSES ACT. 3.

— Criminal Prosecutions—Mandamus - 387

See MANDAMUS TO SERVANTS OF CROWN.

— Lien—Set-off of judgment - - - 499

See SOLICITOR'S LIEN.

— Summons for emitting smoke—Discretion 545

See SMOKE. 3.

COUNTY CORONER—Salary—23 & 24 Vict. c. 116, s. 4.] Where the salary of a county coroner, holding office at the time of the passing of 23 & 24 Vict. c. 116, has once been fixed under that Act at not less than the average amount of the fees, mileage, and allowances received during five years before the 31st of December, 1859, and where the salary of such coroner is subsequently revised after a period of five years, the salary may be fixed at less than the average amount of the fees, mileage, and allowances which would have been received during the preceding five years. *Ex parte Driffield* - - - - - 207

COUNTY COURT—Admiralty jurisdiction 658

See ADMIRALTY COURT JURISDICTION.

COVENANT, BREACH OF—Forfeiture—Waiver Ex. Ch. 344

See WAIVER OF FORFEITURE.

COVENANT FOR QUIET ENJOYMENT—Landlord and Tenant—Restriction by Covenant of Lessor as to particular Trade.] On a conveyance of land to defendant in fee, defendant covenanted with B., the vendor, that defendant and his assigns would not permit to be carried on in any building built on any part of the land the trade of a seller of beer. Defendant afterwards demised for twenty-one years a building on part of the land, which at that time was used as a grocer's shop; the lessee covenanted that he and his assigns would not carry on therein, or permit to be carried on, certain trades (that of a seller of beer not being one); and defendant covenanted that the lessee and his assigns should peaceably enjoy the demised premises without any lawful let, suit, or interruption by or from defendant or any person lawfully claiming from, by, or under him. This lease was assigned to plaintiff; and he, without notice of defendant's covenant with B., altered and fitted up the premises as a beer-shop, upon which B. obtained an injunction from the Court of Chancery restraining plaintiff from carrying on the trade of a beerhouse on the premises. Plaintiff then brought an action against defendant for a breach of the express or of an implied covenant in the deed of demise:—*Held*, affirming the judgment of the Court of Queen's Bench, that the express covenant for quiet enjoyment excluded any implied covenant; and that that covenant did not amount to a warranty to the lessee that he might use the premises for any purpose not mentioned in the restrictive covenant on his part; and, therefore, that plaintiff could not recover. *Spencer v. Marriott* (1 B. & C. 457; 2 D. & Ry. 665) affirmed. *Dennett v. Atherton* Ex. Ch. 316

COVENANT FOR TITLE—Assignment of Lease for Lives—Covenant that Lease is subsisting for the three Lives.] By deed of July, 1853, after reciting a lease of the 10th of March, 1847, from E. F. to defendant, for the lives of A., B., and C.,

COVENANT FOR TITLE—*continued.*

and the survivors or survivor of them, defendant conveyed the premises to plaintiffs, to hold for the lives of A., B., and C., and the survivors or survivor of them, and covenanted "that the said lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law, for the lives of the said A., B., and C., and the survivors or survivor of them, and is not forfeited, surrendered, or become void or voidable." B. having died before July, 1853, plaintiffs sued defendant for a breach of the covenant:—*Held*, affirming the judgment of the Court of Queen's Bench, that the mention of the three lives was mere matter of description, and that the covenant only amounted to a covenant that the lease was still subsisting, and not to an implied covenant that the three lives were still in existence. *COATES v. COLLINS* - - - **Ex. Ch. 144**

CRIMINAL PROCEEDING—Felony—Action **554**
See FELONY.

CROSS REMAINDERS—*Devise—Construction of Will.*] A testator devised an estate, of which he died seised in fee, to his brother W. H., for life, and after the decease of W. H., to the four sons of W. H. his nephews, for lives as tenants in common; and after their decease he devised the share or shares of his said nephews respectively to their respective eldest sons, then living, for life; and after the decease of such eldest sons to the first and other sons of the latter successively in tail male. In default of issue of the eldest sons, he devised the same share or shares to the second, third, and other sons, then living, of his said nephews severally and successively, according to their respective seniorities, and to their issue in tail male in the same manner and for the same estate and estates as he had before given to the eldest sons of such nephews. Failing the issue of the sons then living, he devised to all and every the sons of his nephews hereafter to be born in tail male. After which the will proceeded thus: "And for default of such issue, I give and devise the same to my own right heirs for ever, it being my will and intention that the said lands shall go and remain in my name and family for ever, or so long as the law will permit such enjoyment of the same:—*Held*, that the clause in favour of the heirs general did not take effect so long as any issue of any of the devisees capable of taking as tenants in tail survived, and that cross remainders were to be implied in favour of surviving tenants in common. *HANNAFORD v. HANNAFORD* - - - **116**

CUSTOM—Antiquity—Statute fair - **214**
See STATUTE FAIR.—Contract—Agency - - - **126**
See CUSTOM OF MARKET.

CUSTOM OF MARKET—*Evidence, Admissibility of*—*Usage of Trade to control written Contract—Custom in London Fruit Trade—Making Broker personally liable—Principal and Agent—Broker.*] The defendants, M. & W., fruit brokers in London, being employed by the plaintiffs, merchants in London, to sell for them, gave them the following contract note addressed to the plaintiffs:—"We have this day sold for your account to our principal" so many tons of raisins. (Signed) "M & W., brokers." The defendants' principal having

CUSTOM OF MARKET—*continued.*

accepted part of the raisins, and not having accepted the rest, the plaintiffs brought an action on the contract against the defendants, and they sought to make the defendants personally liable by giving evidence that, in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal; and evidence was also given of a similar custom in the London colonial market:—*Held*, that the evidence of the custom in the same trade was admissible, as not inconsistent with the written contract, on the authority of *Humfrey v. Dale* (7 E. & B. 266; E. B. & E. 1004); and that the evidence of a similar custom in the colonial market was admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade. *FLEET v. MURTON* - - - **126**

DAMAGE—Excessive distress - - - **120**
See EXCESSIVE DISTRESS.—Sheriff—False return - - - **175**
See FALSE RETURN.—Ship—Cargo - - - **Ex. Ch. 225**
See DUTY OF MASTER OF VESSEL.—Slander—Married woman - - - **112**
*See SLANDER.***DANCING**—Licence - - - **Ex. Ch. 588**
*See LICENCE FOR MUSIC.***DEDICATION**—Highway - - - **47**
*See WAY, DEDICATION OF.***DETINUE**—Bailor and bailee—Wharfinger **594**
*See TITLE OF BAILEE.***DEVIATION**—Railway company - - - **364**
*See SUPERFLUOUS LANDS.***DEVISE**—Construction—Cross remainders **116**
See CROSS REMAINDERS.

DEVISE OF COPYHOLD—*For a term of Years with Remainder over—Right of Lord to compel Termor to be admitted.*] A copyholder in fee devised his estate to trustees for a term of years, and subject to the term to A. in fee. A. was admitted and paid a full fine; the admittance on the roll recited the will, and stated that "the lord by his steward delivered to A. seisin of the lands by the rod to hold the same to him and his heirs and assigns for ever according to the purport and effect of the said will; and saving the rights of the lord and all other persons, the said A. was admitted tenant thereof in manner aforesaid. And he paid his fine and relief, but because the said A. is an infant the custody as well of his person as of the premises aforesaid is committed to the guardians of the infant." After the admittance of A. the lord made proclamations, and the trustees refusing to be admitted, he seised quousque:—*Held*, that, as by the form of the admission A. was admitted in present and not merely to the remainder, the lord had both a tenant on the roll and a full fine, and therefore could not force the trustees to come in and be admitted. *EVERINGHAM v. IVATT* - - - **683**

DISCHARGE OF SURETY—*Guarantee—Concealment of Dishonesty of Servant.*] On a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty

DISCHARGE OF SURETY—continued.

of dishonesty in the course of the service, and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.—Declaration on a contract whereby the defendant guaranteed the honesty of one J. S., a servant in the employ of the plaintiff, to the extent of 50*l*. The declaration set out the employment of J. S., and that it was his duty to collect money for the plaintiff and account to her for all sums of money so collected; and that the plaintiff had, before the giving of the guarantee, held in her hands a sum of money belonging to J. S. as a security for the proper performance by J. S. of his duty, which sum the plaintiff had agreed to pay back to J. S. on receiving the defendant's guarantee. The declaration then alleged that in consideration that the plaintiff would pay over to J. S. the money so held and continue him in the service of the plaintiff, in the same capacity as before, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss not exceeding 50*l*. which she might at any time sustain through any breach of his duty by J. S. during the continuance of such service. Breach, that J. S. failed to pay over money to the amount of 50*l*., which he had collected. In answer to this declaration the defendant divided the time during which the service lasted, and during which the loss was sustained into two periods; first, from the 8th of June, 1869, when the contract was made, to the 20th of November, 1869; secondly, from the last-mentioned day to the 6th of April, 1871, when the service terminated. As to the first, the defendant admitted his liability. As to the other he pleaded, on equitable grounds, that J. S. had been guilty of defalcations in the course of his service between the 8th of June and the 20th of November, 1869, which the plaintiff discovered on the latter day, and that the plaintiff, without communicating such discovery to the defendant, and while the defendant was ignorant of J. S.'s dishonesty, agreed with J. S. to continue him in her employ as before, and J. S. agreed to pay to the plaintiff 3*l*. a month on account of the previous defalcations; that J. S. was continued in plaintiff's service accordingly on those terms; and that the loss in respect of which the plea is pleaded was occasioned by acts of dishonesty committed by J. S. during the continuance of the service after the 20th of November, and between that time and the termination of the service, the defendant during that time being wholly ignorant of the previous defalcations of J. S.; and that by reason of the plaintiff not giving the defendant notice of such defalcations he was prevented from revoking the guarantee :—*Held*, on demurrer, that the plea was a good answer to the declaration.—By Cockburn, C.J., Lush and Quain, JJ., on the ground that, as the obligation of the surety is continuing, the obligation of the creditor also continues; and that the representation and understanding, as to the trustworthiness of the servant, on which the contract was originally founded, continue until its termination.—By Blackburn, J.,

DISCHARGE OF SURETY—continued.

that the surety was discharged, because by continuing J. S. in her service, after knowledge of the misconduct, the plaintiff had deprived herself of the right of terminating the service, a right which the surety was entitled in equity to have exercised for his protection.—*Burgess v. Eve* (Law Rep. 13 Eq. 450) approved. **PHILLIPS v. FOXALL** [666

2.—*Loss of Security—Laches of Creditor.* The plaintiffs lent to B. and P., who were traders, 300*l*., for the repayment of which the defendant became surety. At the time of the loan B. & P. assigned by deed dated the 25th of August, 1870, to the plaintiffs, as security for the debt, the lease of their business premises and plant, fixtures, and things thereon. The deed provided for the repayment of the loan upon the 25th of August, 1871, and for the payment of interest on the 25th of February, 1871, and stipulated, that until default in payment of either the principal or interest, B. & P. should continue in possession of the property assigned to the plaintiffs; and that upon such default the plaintiffs should not sell without giving B. and P. one month's notice in writing. This deed was not registered under 17 & 18 Vict. c. 36. B. & P. failed to pay interest upon the 25th of February, but the plaintiffs did not enter into possession. About a week before the 5th of August, the plaintiffs received notice that B. & P. were insolvent, but they allowed them to continue in possession, and on that day B. & P. filed a petition for liquidation under the Bankruptcy Act, 1869, and were adjudged bankrupts. The trustee under the bankruptcy seized and sold the goods and chattels assigned by the deed :—*Held*, that the plaintiffs, by their omission both to register the deed and to seize the property assigned to them on default of payment of the interest, had deprived themselves of the power to assign the security to the surety, and that owing to their laches he was discharged to the amount that the goods were worth. **WULFE v. JAY** - - - - - 756

DISCRETION OF JUSTICES—Costs—Nuisance

See **SMOKE**. 3. [545
— **Licence** - - - - - 490

See **LICENCE TO ALEHOUSE**. 3.

DESCRIPTION OF OCCUPATION - - - 700

See **AFFIDAVIT WITH BILL OF SALE**. 2.

DESCRIPTION OF RESIDENCE—Attesting witness - - - 157

See **AFFIDAVIT WITH BILL OF SALE**. 1.

DISQUALIFICATION FOR TOWN COUNCILLOR—

Municipal Corporation—Assessor to revise Burgess List—5 & 6 Wm. 4, c. 76, s. 37—7 Wm. 4 & 1 Vict. c. 78, ss. 4, 15.] The 7 Wm. 4 & 1 Vict. c. 78, s. 15, by which no Burgess is eligible to be elected a member of the council of a borough while holding the office of assessor, applies only to assessors elected under 5 & 6 Wm. 4, c. 76, s. 37, and does not apply to an assessor for revising the Burgess list appointed under 7 Wm. 4 & 1 Vict. c. 78, s. 4. *Ex parte MOLESWORTH* - - - 209

DISTRESS, Excessive - - - 120

See **EXCESSIVE DISTRESS**.

— **Sale by auction—Money paid** - - - 310

See **AUCTIONEER'S AUTHORITY**.

DOCKS—Poor-rate—Parochial Earnings and Acreage Principles—Rating of Docks in several Parishes. The appellants were the owners and occupiers, under Acts of Parliament, of docks in different parishes on both sides of the river Mersey, which docks by the Acts were to constitute one estate under one management. Certain rates were charged to the vessels entering any one of the docks; and a vessel, having paid for entering one of the docks, could use any of the docks of the same class on either side of the river, or of a higher class by paying the difference. The docks on the Liverpool side were much more frequented than the docks on the Birkenhead side:—*Held*, that, in rating to the poor-rate the docks on the Liverpool side, they were not to be treated as one system of docks with those on the Birkenhead side; but the earnings and outgoings of each set of docks must be kept distinct, and the Liverpool docks rated according to the net earnings on that side.—*Reg. v. Hull Dock Co.* (18 Q.B. 325; 21 L.J. (M.C.) 153), distinguished. **THE MERSEY DOCKS CO. v. OVERSEERS OF LIVERPOOL** - - - - - 643

DOCUMENTS—Inspection - - - - - 767
See PRODUCTION OF DOCUMENTS.

DUTY OF ADJOINING OCCUPIERS—Non-liability of Occupier of upper Floor of House to Occupier of lower Floor for escape of Water. The plaintiff occupied for business purposes the ground floor and the defendants the second floor of the same house, respectively, as tenants from year to year. There was a water-closet on the defendants' premises to and of which they alone had access and use. After their respective premises had been closed on a Saturday evening, water percolated from the water-closet through the first floor to the plaintiff's premises and caused damage to his stock in trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order and failed to close, and the waste pipe being choked with paper. The defects could not be detected without examination, and the defendants did not know of them, and were guilty of no negligence:—*Held*, that there was no obligation on the defendants to keep in the water at their peril: and that they were not liable to the plaintiff for the damage. **ROSS v. FEDDEN** - - - 661

DUTY OF CANAL OWNER—Canal Company—Rights and Liabilities as between Canal Company and Owners of adjacent Mines. The defendants' canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defendants were authorized to take land compulsorily and construct the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the powers of the Act. Commissioners were appointed who were to determine from time to time what sum should be paid for the purchase of lands, and also to determine what other distinct sum should be paid by defendants as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were ex-

DUTY OF CANAL OWNER—continued.

pressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals; provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months' notice to defendants, who might inspect the mines, and might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defendants to inspect the mines, the owners were authorized to work them.—Plaintiff was owner of mines under the canal, and gave defendants proper notice of his intention to work them; defendants did not inspect, and refused to purchase. Plaintiff proceeded to work the mines, without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably disturb the strata, and that there was danger of the water escaping from the canal into the mines; but, except as above, plaintiff did not work his mines in any negligent or unskilful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, and without doing so he could not have obtained the full benefit of his coal. The canal was in good order when plaintiff commenced working his coal; and defendants did all they could to keep the canal watertight, by puddling, &c. During part of the time, while plaintiff's working was going on, they had dammed back the water, and so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for plaintiff to work out his coal. The defendants were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated, and the water of the canal escaped through the cracks and flooded the workings, and plaintiff was obliged to abandon his coal.—The plaintiff thereupon brought an action, charging that defendants, having brought water into the canal, so improperly managed the canal and the water, that it escaped and flooded plaintiff's mine. On the above facts, the Court having power to draw inferences:—*Held*, by Cockburn, C.J., Mellor and Lush, JJ., that an action of tort could not be maintained.—*Semble*, by the same judges, that the plaintiff was entitled to compensation under the Act for the loss of his coal.—Hannen, J., being of a contrary opinion on both points. **DUNN v. BIRMINGHAM CANAL COMPANY** - - - - - 244

DUTY OF LANDOWNER—Negligence—Action—Pleading—Insufficiency of Declaration. Declaration, that the defendant was possessed of yew trees, the clippings off which he knew to be poisonous, and that it was the duty of the defendant to prevent the clippings from being placed on land not occupied by him: that the defendant took so little care of the clippings that the same were placed upon land not occupied by him, whereby the horses of the plaintiff were poisoned:—*Held*, on demurrer, that the declaration, disclosed no facts from which a duty could be inferred in the defendant to take care of the clippings.—*Fletcher v. Rylands* (Law Rep. 3 H. L. 330), distinguished. **WILSON v. NEWBERRY** 31

DUTY OF MASTER OF VESSEL—*Ship and Shipping*—Goods damaged on the Voyage by excepted Perils—Duty to unload, dry, and re-ship Cargo—Measure of Damages.] There is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, where reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading. And for neglect of this duty by the master the shipowner is responsible to the shipper.—The plaintiffs shipped beans on board the defendants' ship, under a bill of lading, from Alexandria to Glasgow, with leave to call at intermediate ports, deliverable to plaintiffs' order on payment of freight by consignees. The ship called at Liverpool, and in going out met with a collision (a peril excepted in the bill of lading), and was obliged to put back for repairs, which detained her a few days. The beans were wetted by sea water in consequence of the collision; and the plaintiffs, being at Liverpool, offered to receive them there, paying freight pro rata; but the defendants' agent refused to deliver them without being paid full freight; and the beans were carried on to Glasgow; and on their arrival there they were much deteriorated in value, beyond what they would have been by the mere wetting from the collision, if they had been dried instead of being carried on as they were. The beans might have been removed at Liverpool from the ship to warehouses and spread out and dried, and there was warehouse accommodation within half a mile of the dock in which the ship was; and by this means the decomposition would have been materially arrested or mitigated. The cost of unshipping, drying, and re-shipping, would have been particular average, payable by the shippers. The plaintiffs brought an action against the defendants, claiming the amount of the extra depreciation. On a case disclosing the above facts, the Court having power to draw inferences:—*Held* (affirming the judgment of the Court of Queen's Bench), that the facts shewed that the beans might have been taken out and dried (which was clearly a proper thing to do on behalf of the owners), and then re-shipped, without unreasonably delaying the whole adventure; that it was, therefore, the master's duty to have done so, and consequently the defendants were liable:—*Semle*, that the measure of damages was the amount of extra depreciation in value in consequence of the neglect to dry the beans, after allowing the estimated expense of unshipping, drying, and re-shipping. *NOTARA v. HENDERSON* [Ex. Ch. 225]

EJECTMENT—Forfeiture—Waiver Ex. Ch. 344
See WAIVER OF FORFEITURE.

— Interrogatories - - - - 239
See INTERROGATORIES IN EJECTMENT.

ELECTION—Local Board - - - 26
See "OWNER," 2.

ELECTION—continued.

— Municipal—Disqualification - - 219
See DISQUALIFICATION FOR TOWN COUNCILLOR.

— Municipal—Married woman's vote - 361
See ELECTION OF TOWN COUNCILLOR.

— Municipal—Voting paper—Stamp - 463
See STAMP.

ELECTION OF REMEDY—*Public Health Act, 1848* (11 & 12 Vict. c. 63), ss. 69, 90—*Local Government Act, 1858* (21 & 22 Vict. c. 98)—*Local Government Amendment Act* (24 & 25 Vict. c. 61), s. 23—11 & 12 Vict. c. 43, s. 11—*Private Improvement Expenses*—*Summary Proceedings to recover Expenses of Execution of Works.*] By s. 69 of 12 Vict. c. 63, in case any street, not being a highway, be not sewered, &c., to the satisfaction of a local board of health, such board may require the owners of the adjoining premises to sewer, &c., the same within a time to be specified; and upon default of the owners, the board may execute the works, and the expenses shall be paid by the owners in default in such proportion as shall be settled by the surveyor to the board; and such expenses may be recovered from the owners in a summary manner, or may be declared by the board to be private improvement expenses. By s. 90 the local board may levy upon the occupier of the premises, in respect of which private improvement expenses have been incurred, rates sufficient to discharge such expenses. The respondents, a local board of health, under s. 69 of 11 & 12 Vict. c. 63, executed certain works, and apportioned the costs among the owners, of whom the appellant was one. The works were completed in November, 1860; and in January, 1861, the respondents demanded from the appellant payment of his proportion of the costs. This amount not having been paid, on the 25th of August, 1870, the respondents resolved that it should be deemed private improvement expenses. In September, 1870, the respondents declared those expenses should be paid by annual instalments. A demand having been made on the appellant, he refused to pay, and was summoned before justices:—*Held*, that as the respondents had in January, 1861, demanded from the appellant payment of his proportion of the costs, they had elected to treat the amount due as a debt from him as owner; and that they could not afterwards, in September, 1870, declare them to be private improvement expenses. *WILSON v. MAYOR OF BOLTON* - 105

ELECTION OF TOWN COUNCILLOR—*Municipal Election*—*Right of Married Women to Vote*—32 & 33 Vict. c. 55, s. 9—33 & 34 Vict. c. 93.] The 32 and 33 Vict. c. 55, s. 9,—which enacts that, in the Municipal Corporation Acts, words importing the masculine gender shall include females for all purposes connected with the right to vote at the election of councillors, auditors, and assessors,—has reference only to the disability of women by reason of sex, and has no reference to the disability by reason of the status of coverture. And the Married Woman's Property Act (33 & 34 Vict. c. 93) has no reference to the political disabilities of married women:—*Held*, therefore (on a rule for a quo warranto against a town councillor who had been elected by a majority of one), that a married

ELECTION OF TOWN COUNCILLOR—continued.

woman, though qualified by occupation and payment of rates and put on the burgess list, cannot vote at the election of town councillors.—*Semble*, that a woman, who is rightly on the burgess list, but married before the election, is also disqualified from voting. *THE QUEEN v. HARRALD* - 361

ENCROACHMENT—Highway—“Sides of Carriage or Cartway”—27 & 28 Vict. c. 101, s. 51.] The Highway Act, 1864 (27 & 28 Vict. c. 101), s. 51, subjects to summary conviction, in the penalty of 40s., any person who “shall encroach . . . by making or causing to be made any building, or pit, or hedge, ditch, or other fence, . . . on the side or sides of any carriageway or cartway, within fifteen feet of the centre thereof, . . . notwithstanding that the whole space of fifteen feet from the centre of such carriageway or cartway has not been maintained with stones or other materials, used in forming highways”:—*Held*, that “the sides of any carriage or cartway,” meant any land forming part of the highway, though not part of the metalled road; but did not extend to land which, though by the side of the road, had not been dedicated as highway to the use of the public. *EASTON v. RICHMOND HIGHWAY BOARD* - 69

ENROLMENT OF ARTICLES—Attorney - 297
See *ARTICLED CLERK*.

EQUITABLE CLAIM—Set-off - - - 34
See *SET-OFF*.

ESCAPE OF WATER—Adjoining occupiers 661
See *DUTY OF ADJOINING OCCUPIERS*.

ESTOPPEL—Sheriff—False return - - 175
See *FALSE RETURN*.

EVIDENCE—Bastardy—Mother - - 773
See *BASTARDY*. 2.

— Custom of trade - - - 126
See *CUSTOM OF MARKET*.

— Use of net for taking game - - 478
See *POACHING PREVENTION ACT*.

EXCESSIVE DISTRESS—Landlord and Tenant—Special Property in Goods distrained.] The plaintiff was tenant and the defendant landlord of a house occupied by the former, his wife, and a trustee. Goods therein had been assigned to the trustee on trust for the plaintiff's wife. Rent being in arrear to the amount of 9*l.* only, the defendant, by his bailiff, distrained for 18*l.* and costs, seizing 100*l.* worth of the goods. The rent actually due was tendered to the bailiff, with expenses, but refused, and he remained in possession until an undertaking was given on behalf of the plaintiff for payment of the whole demand, and a part amounting to 2*l.* 7*s.* was paid, whereupon the distress was withdrawn.—The plaintiff having brought an action for an excessive distress, and on the money counts, was nonsuited when the deed of assignment was produced at the trial:—*Held*, that, although he was neither the legal nor the equitable owner of the goods distrained, yet he had, from his mere enjoyment of the use of them, a special property which entitled him to maintain the action. *FELL v. WHITTAKER* - - - 120

EXECUTION—Sheriff—False return - 175
See *FALSE RETURN*.

EXECUTOR—Set-off - - - 24
See *SET-OFF*.

EXPECTED TO ARRIVE - - - *Ex. Ch.* 139
See *CARGO “EXPECTED TO ARRIVE,”*

FAIR AND REASONABLE SUPPOSITION OF RIGHT - - - *Ex. Ch.* 353
See *JUSTICES’ JURISDICTION*. 1.

FAIR CRITICISM—Libel - - - 11
See *LIBEL*.

FALSE RETURN—Sheriff, Action against—Estoppel—Actual Damage.] The plaintiff, an execution creditor, delivered a writ of *fi. fa.* to the sheriff, who proceeded to execute it by seizing goods upon the premises and apparently the property of the execution debtor, but which were then, in fact, in possession of the holder of a bill of sale to whom they had been previously assigned. The sheriff remained on the premises until dismissed by the plaintiff's attorney, and, being directed to return the writ, made a return, that he had seized goods of the debtor and kept them until ordered by the plaintiff's attorney to withdraw from possession. To an action brought by the plaintiff against the sheriff for not levying under the writ, and for a false return, the defendant pleaded (*inter alia*), *nulla bona*, and at the trial, set up, as his sole defence, the bill of sale, which the jury found to be valid; and a verdict was entered for the defendant:—*Held*, that actual damage was necessary to support the action; that the defendant was not estopped by his return from proving that the goods seized did not belong to the debtor; that as they were found to be the property of the assignee they were not available for sale under the execution; and that, therefore, the plaintiff had sustained no damage from the conduct of the sheriff, and could not maintain the action. *STIMSON v. FARNHAM* [175]

FEES—Surveyor—“Owner” - - - 55
See *“OWNER.”* 1.

FELONY—Action—Civil or Criminal Proceeding—Practice—Trespass—New Trial.] In an action of trover and trespass for a brooch, the pleas being not guilty and not possessed, the jury found a verdict for the plaintiff. A rule for a new trial having been obtained, on the ground that it appeared from the evidence that the brooch was taken by the defendant under such circumstances as to prove a charge of felony, and that the judge ought, therefore, to have nonsuited the plaintiff:—*Held*, that the judge was bound to try the issues, on the record, and that he was right in not having nonsuited the plaintiff. *WELLS v. ABRAHAMS* 554

FI. FA.—False return - - - 175
See *FALSE RETURN*.

FINE—Copyhold - - - 683
See *DEVISE OF COPYHOLD*.

FOREIGN CORPORATION—Liability to be sued in England—Practice—Service of Writ.] A foreign corporation, carrying on business in England, although not incorporated according to English law, may be sued as defendants in an English court, in respect of a cause of action which arose within the jurisdiction.—*So held*, on a motion to set aside service of writ.—Service of a writ of summons on the head officer of an English branch of a foreign corporation carrying on business in

FOREIGN CORPORATION—continued.

England is good service, and it is not necessary to serve the process on the officer at the head office abroad. *NEWBY v. VON OPPEN* - - - 293

FORFEITURE—Waiver - - - **Ex. Ch. 344**
See WAIVER OF FORFEITURE.

FRAUDS, STATUTE OF—29 Car. 2, c. 3, s. 4—
Promise to be answerable for Debt of Another—
Evidence of Promise to be primarily liable.] The plaintiff had been employed to construct a main sewer by a local board of health, of which the defendant was chairman. When the sewer was nearly completed the board gave notice, under 11 & 12 Vict. c. 63, s. 69, to the occupiers of the adjoining houses, to connect their drainage within twenty-one days, or the board would do the work at their expense. Before the twenty-one days had expired, the plaintiff, having completed the sewer, was about to leave the place with his carts, &c., when the defendant sent after him, and the following conversation took place. The defendant said, "What objection have you to making the connections?" The plaintiff replied, "I have none, if you or the board will order the work, or become responsible for the payment." The defendant replied, "Go on and do the work, and I will see you paid." The plaintiff accordingly did the work under the superintendence of the surveyor of the board; and sent in the account to the board debiting them with the amount. The board refused payment on the ground that they had not authorized the order; and after more than two years, the account being still unpaid, the plaintiff made a claim, and brought an action against the defendant.—The above evidence having been given by the plaintiff, the defendant denied that any conversation of the kind deposed to ever took place; the jury found that it did take place, and a verdict passed for the plaintiff, leave being reserved to enter a nonsuit.—The Court of Queen's Bench made the rule absolute to enter a nonsuit, on the ground that the conversation did not amount to an undertaking of the defendant to be primarily liable for the work; but only to a promise that if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not, and that this was a promise to be answerable for the debt of another person within s. 4 of the Statute of Frauds, and not being in writing could not be enforced. On appeal:—The Court of Exchequer Chamber reversed the judgment, on the ground that there was evidence on which the jury might have found that the defendant agreed to be primarily liable. *MOUNTSTEPHEN v. LAKEMAN* - - -

[**Ex. Ch. 196**

FRONTAGE—Conveyance of house - - - 748
See HOUSE.

GAME—Net for taking—Use - - - 478
See POACHING PREVENTION ACT.

GOODS—Defamation of - - - 11
See LIBEL.

GOODS AT RISK OF SELLER—Buyer and Seller—
Construction of Contract of Sale—Insurance by Seller of Goods.] The plaintiffs, sugar refiners, were in the habit of selling to brokers the whole of each filling of sugar, consisting of from 200 to 300 loaves or "tillers" each, the terms always being "Prompt at one month; goods at sellers'

GOODS AT RISK OF SELLER—continued.

risk for two months," the "prompt" day being the Saturday next after the expiration of one month from the sale. The titlers in each filling were stored on the plaintiffs' premises, and were from time to time fetched away by the purchasers or their sub-vendees, being weighed on their removal, each titler weighing from thirty-eight to forty-two pounds. If the whole of the lots contained in one sale-note had not (which was frequently the case) been taken away on the "prompt" day payment was made by the purchaser (by bill or cash) at an approximate sum calculated on the probable weight, the actual price being afterwards adjusted on the whole filling being cleared.—The defendant, who was an old customer of the plaintiffs, had bought four fillings, consisting of specific titlers, each marked, on the above terms, and had paid the approximate price of the four lots, and had fetched some of each lot away. A fire occurred on the plaintiffs' premises after the expiration of the two months from the dates of sale to the defendant, destroying the whole contents of the warehouses. At the time of the fire the plaintiffs had floating policies of insurance which covered goods on the premises "sold and paid for, but not removed;" but they had no agreement or understanding with their customers as to any insurance; and the amount insured, which the plaintiffs received from the underwriters, was not sufficient to cover the loss of their own goods, exclusive of the titlers undelivered which they had sold to the defendant:—*Held*, by Cockburn, C.J., on the ground that the property in the titlers undelivered had passed to the defendant; by Blackburn, Lush, and Quain, JJ., whether it had passed or not, that, by the terms of the contract of sale, the risk, after the lapse of the two months, was in the buyer, and the loss was, therefore, his. Secondly, that, as there was no contract between the plaintiffs and their customers as to insurance, the plaintiffs were under no obligation in the matter, and were entitled to appropriate to their own losses the whole sum received from the insurance offices.—*Semble*, by Blackburn and Lush, JJ., that the property in the titlers undelivered had passed to the defendant. *MARTINEAU v. KITCHING* - - - 436

"GOVERNMENT CLERK" - - - 700
See AFFIDAVIT WITH BILL OF SALE. 2.

GRANT OF MINES—Support of surface - - - 716
See SUPPORT.

GUARANTEE—Discharge of surety 666, 756
See DISCHARGE OF SURETY. 1, 2.

— **Statute of Frauds** - - - **Ex. Ch. 196**
See FRAUDS, STATUTE OF.

GUILTY KNOWLEDGE—Adulteration of bread
See ADULTERATION OF BREAD. [135]

GUNPOWDER—Ammunition, Keeping of without
Licence—Gunpowder Act, 1860 (23 & 24 Vict. c. 139), ss. 6, 7.] Sections 6 and 7 of 23 & 24 Vict. c. 139, which prohibit under forfeiture and penalties the manufacture and keeping, inter alia, of ammunition containing five pounds of gunpowder without a licence, apply only to the keeping by manufacturers of the articles; and a gunmaker who sells loaded cartridges manufactured by other persons is not within the enactment. *WEBLEY v. WOOLLEY* - - - 61

GUNPOWDER—*continued.*

2. — *Gunpowder Act, 1860 (23 & 24 Vict. c. 139), ss. 2, 4*—*Duty to erect Lightning Conductors in Connection with Gunpowder Magazines.*] By the Gunpowder Act, 1860 (23 & 24 Vict. c. 139), s. 2, par. 9, "Every maker of gunpowder shall cause to be erected good and sufficient lightning conductors in connection with every store magazine where gunpowder is kept by him." By s. 4, "All gunpowder in any mill, press-house, corning-house, drying-house, or other place exceeding the quantity which for the time being may lawfully be therein, shall be forfeited; and every person keeping or causing to be kept in any such mill or place any gunpowder contrary to the provisions hereinbefore contained, shall for so doing, in addition to such forfeiture as aforesaid, forfeit for every such offence any sum not exceeding 2s. for every pound of gunpowder so forfeited."—*Held*, that gunpowder manufacturers, who kept gunpowder in a store magazine without having provided lightning conductors, could not be proceeded against under s. 4 for keeping gunpowder contrary to the provisions of the Act. *ELIOTT v. MAJENDIE* - - - - - 429

GUNPOWDER ACT, 1860, ss. 2, 4 - - - 61, 429
See GUNPOWDER, 1, 2.

HACKNEY CARRIAGE—*Plying for Hire elsewhere than at a Standing*—6 & 7 Vict. c. 86, s. 33.] By 6 & 7 Vict. c. 86, s. 33, a penalty is imposed on the driver of a hackney carriage who shall ply for hire elsewhere than at some standing appointed for the purpose.—*Held*, that the plying for hire within this section must be in some public street or place; and that the driver of a hackney carriage, who plied for hire on an open unenclosed piece of private ground, to which the public had access, but over which there was no public right of way, was not within the section. *SKINNER v. USHER* - - - - - 423

HIGHWAY—Dedication - - - - - 47
See WAY, DEDICATION OF.

— Encroachment - - - - - 69
See ENCROACHMENT.

— Stalls—Custom - - - - - 214
See STATUTE FAIR.

— Toll—"Taxed cart" - - - - - 285
See "TAXED CART."

HIGHWAY ACT - - - - - 47
See WAY, DEDICATION OF.

HOUSE—*Conveyance of House*—"House now in the Occupation of P."—*Ornamental Frontage extending across adjoining House.*] The plaintiff, having agreed to purchase two adjoining houses, agreed to sell one to P., and by plaintiff's direction that house was conveyed to P., (and by him to defendant) in fee, the description being, "all that dwelling-house now in the occupation of P." The houses were in a street, and were built up to the foot pavement. On the front of defendant's house, at the side which adjoined the plaintiff's, was a slight projection nine feet wide, in the middle of this was the doorway, three and a half feet wide, and on each side of the doorway was a pillar supporting a shallow portico; over the doorway was a window of the same width, and above that a pediment; all symmetrically placed on the nine-feet projection. Inside, the party-

HOUSE—*continued.*

wall, dividing the two houses, instead of being coincident with the extremity of the nine-feet projection, was in a direct line with one side of the doorway, so that if the party-wall had been prolonged in a straight line to the street, two feet eleven inches of the width of the projection, which included part of the portico and of the pediment and the whole of one of the pillars supporting the portico, would have been on the plaintiff's side of that line; and on the inside, these two feet eleven inches, which, from the outside, appeared to be part of defendant's house, formed part of the wall of the front room of plaintiff's house. The defendant having painted the two pillars, the portico, and the whole of the pediment, which were stucco, plaintiff brought an action of trespass, claiming as his the one pillar, the part of the portico, and the part of the pediment over the pillar. On the above facts, the Court having power to draw inferences of fact:—*Held* (by Blackburn and Mellor, J.J.; Lush, J., dissenting), that the disputed parts belonged to the plaintiff, and did not pass as part of the house in the occupation of P. *FOX v. CLARKE* - 748

HOUSE FOR DANCING, MUSIC, OR OTHER PUBLIC ENTERTAINMENT *Ex. Ch.* 588
See LICENCE FOR MUSIC.

HUSBAND AND WIFE—Money received 218
See MONEY RECEIVED TO USE OF HUSBAND AND WIFE.

IMPLIED CROSS REMAINDERS—Will . 116
See CROSS REMAINDERS.

INJURIOUS AFFECTION—Compensation - 728
See COMPENSATION UNDER LANDS CLAUSES ACT, 4.

INNKEEPER—Lien - - - - - 711
See LIEN OF INNKEEPER.

INSPECTION OF DOCUMENTS - - - - - 767
See PRODUCTION OF DOCUMENTS.

"**INSURANCE CLERK**" - - - - - 700
See AFFIDAVIT WITH BILL OF SALE, 2.

INSURANCE, MARINE—Carrier - - - - - 78
See INSURANCE BY CARRIER.

— Commencement of policy - - - 580, 702
See COMMENCEMENT OF POLICY, 1, 2.

— Mistake in policy - - - - - *Ex. Ch.* 517
See MISTAKE IN POLICY.

INSURANCE BY CARRIER—*Marine Insurance*—*Construction of Policy*—*Mode of estimating Underwriters' Liability.*] The plaintiffs, J. & Son, were lightermen, and effected an insurance in the form of an ordinary Lloyd's policy, at and from all wharves on the Thames, from Wandsworth to the Victoria Docks, which contained the following clause:—"To cover and include all losses, damages, and accidents amounting to 20l. or upwards in each craft, to goods carried by J. & Son as lightermen, or delivered to them to be waterborne, either in their own or other craft, and for which losses, damages, and accidents J. & Son may be liable or responsible to the owners thereof, or others interested." The policy was subscribed by different underwriters for different sums amounting to 2000l., and the defendants underwrote the policy for 100l. A loss happened to goods carried by the plaintiffs in a barge, for which the plaintiffs

INSURANCE BY CARRIERS—continued.

became liable to those interested in the goods to the amount of 1100*l.* The total value of the risks of the plaintiffs in this and other barges at the time of the loss and covered by the policy amounted to 20,000*l.*—*Held*, that, on the construction of the policy, the plaintiffs were entitled to be indemnified for the loss actually sustained, viz., 1100*l.*, and to recover from the defendant 55*l.*, his proportion; and that the sum to be recovered was not merely such a proportion of the plaintiffs' loss as the sum for which the defendant subscribed the policy, viz. 100*l.*, bore to the value of all the goods afloat and covered by the policy at the time of the loss, viz., 20,000*l.*
JOYCE v. KENNARD - - - - - 78

INTEREST—Payment—Statute of Limitations 493
See LIMITATIONS, STATUTE OF.

INTERROGATORIES—Ejectment - - - 239
See INTERROGATORIES IN EJECTMENT.

INTERROGATORIES IN EJECTMENT—*Tenant seeking to prove Landlord's Title expired.*] A tenant withholding possession of demised premises after the termination of his lease, and defending an action of ejectment brought by his lessor, will not be allowed to administer interrogatories to the plaintiff which seek to ascertain the fact that the title of the latter has expired. **WALLEN v. FORRETT** 239

IRON MINES—Surface lands—Rateability 334
See SURFACE LANDS.

IRREMOVABILITY OF POOR—*Poor Law—Removal of Pauper—Break of Residence*—9 & 10 *Vict. c. 66, s. 1.*] A widow woman, aged seventy, who had resided in the parish of M. for many years, went into service in the same parish. She remained in service about six weeks, when, being too old for service, she left, saying she would have a holiday. She went on a visit to her son, who was living out of the parish, and stayed with him three days. She then went on a visit to a friend, who also lived out of the parish, and with whom she also stayed three days, and while there endeavoured to get work, and had she succeeded she would have returned to M. She then went on a visit for one day to a friend in M., and the next day went into the workhouse at M.:—*Held*, that she was irremovable from M., as her temporary absence from M. did not amount to a break of residence. **THE QUEEN v. GUARDIANS OF ST. IVES UNION** - 467

JUDGMENT—Set-off—Solicitor's lien - 499
See SOLICITOR'S LIEN.

JURISDICTION—Admiralty - - - 658
See ADMIRALTY COURT JURISDICTION.

— Foreign corporation - - - 293
See FOREIGN CORPORATION.

— Justices' - - - 353, 416
See JUSTICES' JURISDICTION. 1, 2.

— Justices'—Alehouse licence 482, 487, 490
See LICENCE TO ALEHOUSE. 1, 2, 3.

— Justices'—Bastardy - - - 773
See BASTARDY. 2.

— Justices'—Music licence - **Ex. Ch. 588**
See LICENCE FOR MUSIC.

— Quarter sessions - - - 288
See APPEAL TO QUARTER SESSIONS.

JUSTICES—Alehouse licence - 482, 487, 490
See LICENCE TO ALEHOUSE. 1, 2, 3.

— Appeal - - - 16
See BASTARDY. 1.

— Bastardy - - - 16, 773
See BASTARDY. 1, 2.

— Discretion—Costs - - - 545
See SMOKE. 3.

— Jurisdiction - - - 353, 416
See JUSTICES' JURISDICTION. 1, 2.

— Metropolitan district - - - 443
See APPROPRIATION OF PENALTIES.

— Music licence - - - **Ex. Ch. 588**
See LICENCE FOR MUSIC.

JUSTICES' JURISDICTION—24 & 25 *Vict. c. 97, s. 52*—"Wilful" Damage to Property—"Fair and Reasonable Supposition of Right."] By 24 & 25 *Vict. c. 97, s. 52*, "whoever shall wilfully or maliciously commit any damage to any real or personal property, shall, on conviction before a justice, be subject to imprisonment or fine. . . . Provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of. . . ."—The appellant was charged under the above section on the following facts:—The appellant, being employed by D., went with thirteen other men, and without any communication with the respondent, entered an enclosed garden of the respondent's and dug a ditch four feet wide and three feet deep, and from forty to fifty yards long, extending from one end of the garden to the other. There had, some fifteen years ago, been a ditch over part of the ground, before it was enclosed as a garden by respondent's predecessor in title; but there had never been any ditch for about twenty yards of the length cut by appellant. D. was exercising "what he considered a public right."—The justices found that the appellant did not act under a reasonable supposition that he had a right to do the act complained of, and convicted him accordingly:—*Held*, that the conviction was right; that the express proviso in s. 52 overrode the proviso usually implied as to summary convictions, that a *bonâ fide* claim of right ousted the jurisdiction of the justices. That, under the circumstances, the appellant could not be in a better position than D. who employed him, and assuming in his favour (which did not appear) that he had all the knowledge which D. had, the justices were right in finding that he did not act under a fair and reasonable supposition of right. **WHITE v. FEAST** - 353

— *Contagious Diseases (Animals) Act, 1869* (32 & 33 *Vict. c. 70*), ss. 57, 103, 108—*Jurisdiction impliedly given to Justices to convict summarily.*] By s. 57 of the *Contagious Diseases (Animals) Act, 1870*, if any person exposes, in a public place where animals are commonly exposed for sale, any animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shews, to the satisfaction of the justices before whom he is charged, that he did not know of the same being so affected; and by s. 103 a penalty not exceeding 20*l.* is imposed on any person guilty

JUSTICES' JURISDICTION—continued.

of an offence against the Act:—*Held*, that jurisdiction was impliedly given to justices to summarily convict in a penalty a person guilty of an offence under s. 57. CULLEN v. TRIMBLE - 416

LABOURERS, STATUTE OF - - - 214
See STATUTE FAIR.

LACHES OF CREDITOR—Surety - - - 751
See DISCHARGE OF SURETY. 2.

LAKE—Navigation—Obstruction - - - 166
See OBSTRUCTION OF NAVIGATION.

LANDLORD AND TENANT—Ejectment—Interrogatories - - - 239
See INTERROGATORIES IN EJECTMENT.

— Excessive distress - - - 120
See EXCESSIVE DISTRESS.

— Forfeiture—Waiver - - - Ex. Ch. 344
See WAIVER OF FORFEITURE.

— Quiet enjoyment - - - Ex. Ch. 316
See COVENANT FOR QUIET ENJOYMENT.

LANDS CLAUSES CONSOLIDATION ACT—Compensation - 1, 728, 776, Ex. Ch. 148
See COMPENSATION UNDER LANDS CLAUSES ACT. 1, 2, 3, 4.

LANDS CLAUSES CONSOLIDATION ACT, 1869—
[776]
See COMPENSATION UNDER LANDS CLAUSES ACT. 3.

LANDS INJURIOUSLY AFFECTED - - - 728
See COMPENSATION UNDER LANDS CLAUSES ACT. 4.

LEASE—Assignment—Covenant for title
See COVENANT FOR TITLE. [Ex. Ch. 144]

LEASE FOR LIVES—Assignment Ex. Ch. 144
See COVENANT FOR TITLE.

LIBEL—Defamation, as to Goods manufactured by Plaintiff—Action, when maintainable.] Declaration, that the plaintiffs were manufacturers of bags, and manufactured a bag which they called the "Bag of Bags," and the defendant printed and published, concerning the plaintiffs in their business, the words following:—"As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public ad nauseam":—*Held*, on demurrer, by Mellor and Hannen, JJ., that it was a question for the jury whether the words did not convey an imputation on the plaintiffs' conduct in their business, and whether the language went beyond the limits of fair criticism.—By Lush, J., that the words could not be deemed libellous, either upon the plaintiffs or upon their mode of conducting their business.

JENNER v. A'BECKETT - - - 11

LICENCE—Alehouse - - - 482, 487, 490
See LICENCE TO ALEHOUSE. 1, 2, 3.

— Dancing—Music - - - Ex. Ch. 588
See LICENCE FOR MUSIC.

LICENCE FOR MUSIC—House kept for Public Dancing, Music, or other public Entertainment—25 Geo. 2, c. 36, ss. 2, 3.] Under 25 Geo. 2, c. 36,

LICENCE FOR MUSIC—continued.

s. 2, which empowers justices to license a house for public dancing, music, or other public entertainment of the kind, the justices have a discretion to grant a licence for one of the purposes only, viz., music; and the keeper of a house with a music licence only, is liable to the penalty for keeping a house without a licence, if he permit public dancing in the house.—So held in the Court of Exchequer Chamber, affirming the decision of the Court of Queen's Bench. BROWN v. NGENT

[Ex. Ch. 588]

LICENCE TO ALEHOUSE—*Licence for Sale of Exciseable Liquors—Change of Occupancy—Expiration of Licence—Subsequent Removal—New Tenant—Application to Special Sessions*—9 Geo. 4, c. 61, ss. 4, 14.] W., duly licensed under 9 Geo. 4, c. 61, applied at a general annual licensing meeting, on the 15th of September, for a renewal of his licence, which was refused. The licence expired on the 10th of October following, and he then ceased to sell exciseable liquors, but continued in occupation of the house until the 13th of October; he then gave up possession to S., who, after giving the proper notices, applied at a special sessions for a new licence in respect of the premises, under s. 14. The justices refused the application, on the ground that, as W. was not licensed within the terms of the above section at the time of his removal from the house, they had no jurisdiction.—*Held*, that the decision of the justices was right. SIMPKIN v. JUSTICES OF BIRMINGHAM - - - 482

2.—*Licence for Sale of Exciseable Liquors—New Tenant—Application to Special Sessions after Refusal by General Sessions*—9 Geo. 4, c. 61, s. 14.] A house in Middlesex having been licensed for some years under 9 Geo. 4, c. 61, L., the licensed tenant, gave up possession on the 6th of February to T. At the adjourned general annual licensing meeting on the 24th of March, application for a licence was made on behalf of T. This was refused, and no appeal was made under s. 27. The licence having expired on the 5th of April, the house was shut up. On the 4th of May, T. applied under s. 14 to the special sessions, who refused the licence on the ground that the renewal of the licence had been refused at the general meeting. T. again applied, on the 4th of July, to the special sessions, under s. 14; and the justices refused a licence on the ground that the case was not within s. 14. On appeal the general sessions refused on the same ground:—*Held*, that, having applied to the general licensing meeting, and been refused, T. could not afterwards go to the special sessions. THE QUEEN v. TAYLOR - 487

3.—*Licence for Sale of Exciseable Liquors—9 Geo. 4, c. 61, s. 14—Change of Tenant—Discretion of Justices—Jurisdiction of Special Sessions.*] G., the occupier of a house, licensed under 9 Geo. 4, c. 61, having been fined for an offence against the tenor of his licence, was ejected by his landlord on the 17th of May. In June, H. was let into possession, and on the 5th of June the petty sessions refused to indorse G.'s licence to H., under 5 & 6 Vict. c. 44. H. then gave up possession, and at the general licensing meeting on the 4th of September the house was unoccupied, and no application was made for a licence. The appellant afterwards became tenant, and applied at the

LICENCE TO ALEHOUSE—continued.

special sessions on the 20th of November for a new licence under s. 14; but after hearing the case on the merits the justices refused to grant a new licence. On appeal, the quarter sessions, finding the appellant to be a proper person, dismissed the appeal on the ground that the granting or refusing of such new licence was within the discretion of the justices at special sessions:—*Held*, that the justices had a discretion to grant or refuse the licence.—*Quære*, whether under the circumstances the special sessions had any jurisdiction. **THE QUEEN v. ROWELL** - - - - 490

LICENCE TO SEIZE GOODS—Bankruptcy or Liquidation under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)—Effect of Discharge on Bill of Sale, as to after-acquired Goods—Security. Declaration for entering plaintiff's premises and seizing goods of plaintiff. Plea: That by indenture the plaintiff assigned all his household goods, &c., on certain premises to defendant, to secure the repayment of 52*l.* lent by defendant to plaintiff; and it was agreed that, if the 52*l.* were not repaid on the day named, and so long as any money should be secured or recoverable by virtue of the deed, defendant was to be at liberty to enter and take, and on default to sell the goods; and it was further agreed that, if, during the continuance of this security, the plaintiff should become possessed of any goods other than those already assigned, the same should in all respects be subject to the deed, and be accordingly seized and sold in the same manner as if they were, at the date of the deed, possessed by plaintiff and duly assigned to defendant. The plea then alleged that defendant seized the goods in the declaration mentioned by virtue of the above deed. Replication: That after the bill of sale, and before the seizing of the goods, plaintiff filed a petition for the liquidation of his affairs, which was duly carried out under the Bankruptcy Act, 1869; and that the goods were goods acquired by plaintiff after the liquidation, and plaintiff then held them freed and discharged from the bill of sale. On demurrer:—*Held*, that, the debt being released by virtue of the liquidation under the Bankruptcy Act, 1869, the power in the deed to seize after-acquired property so long as the debt remained secured by the deed must fall with it.—*Lyde v. Mynn* (4 Sim. 505; 1 My. & K. 683) distinguished. **THOMPSON v. COHEN** - - - - 527

LIEN OF INNKEEPER—Goods belonging to third Person—What Goods subject to the Lien. B. went to defendant's hotel and took with him, as his own, a pianoforte which he had hired of plaintiff. B. having remained at the hotel several weeks left in debt for his board and lodging; and defendant claimed to detain the piano as against plaintiff in exercise of his lien as innkeeper:—*Held*, that, as defendant had received the piano as part of the goods of his guest, he had a lien upon it. **THRE-FALL v. BORWICK** - - - - 711

LIGHTNING CONDUCTOR—Gunpowder magazine - - - - 429
See GUNPOWDER. 2.

LIMITATIONS, STATUTE OF—(21 Jac. 1, c. 16. s. 3)—Part Payment—Interest paid under Compulsion of Law—Res Judicata—Principal and Interest. Defendants were the executors of the maker of a promissory note, made more than six years

LIMITATIONS, STATUTE OF—continued.

before action, by which he promised to pay plaintiff on demand 32*l.*, with interest thereon, at the rate of 5*l.* per cent. Within six years before action, plaintiff had sued defendants for interest upon the note, and defendants defended the suit; plaintiff recovered judgment for the interest claimed, and defendants thereupon paid the amount recovered:—*Held*, that this payment of interest, not being such that a promise to pay the principal could be inferred in fact from it, was not sufficient to take the principal debt out of the operation of the Statute of Limitations.—*Semble*, per Blackburn, J., that the recovery of the interest in the first action was no bar to a second action being brought for the principal. **MORGAN v. ROWLANDS** 493

LIMITS OF DEVIATION—Railway company 364
See SUPERFLUOUS LANDS.

LIQUIDATION—Licence to seize goods - 527
See LICENCE TO SEIZE GOODS.

LIVES, LEASE FOR—Assignment Ex. Ch. 144
See COVENANT FOR TITLE.

LOADING OF CARGO—Charterparty—Ceasing of liability - - - - 500
See CEASING OF LIABILITY ON CHARTER.

LOCAL BOARD OF HEALTH—Owner - 26
See "OWNER." 2.

LOCAL GOVERNMENT ACT, 1858 - 105
See ELECTION OF REMEDY.

— - - - - 690
See MARKET.

LOCAL GOVERNMENT AMENDMENT ACT 105
See ELECTION OF REMEDY.

LOSS OF HOSPITALITY—Slander—Special damage - - - - 112
See SLANDER.

LOSS OF SECURITY—Laches—Surety - 756
See DISCHARGE OF SURETY. 2.

MAGAZINE—Gunpowder—Lightning conductor
See GUNPOWDER. 2. [429]

MANDAMUS—Servants of Crown - - 387
See MANDAMUS TO SERVANTS OF CROWN.

MANDAMUS TO SERVANTS OF CROWN—Costs of Criminal Prosecution—Annual Appropriation Act, 1871 (34 & 35 Vict. c. 89), s. 3, sch. B. part 7, class 3—29 & 30 Vict. c. 39, s. 14.] By 29 & 30 Vict. c. 39, s. 14, when any sum of money shall have been granted to Her Majesty by Act of Parliament to defray expenses for any specified public services, it shall be lawful for Her Majesty from time to time, by order under the sign-manual, countersigned by the Treasury, to authorize and require the Treasury to issue out of the credits granted to them the sums which may be required to defray such expenses not exceeding the amount of the sums granted.—By the Annual Appropriation Acts, out of the sums granted to Her Majesty for the service of each year, a certain sum is applied to defray the charges "for prosecutions at assizes and quarter sessions, in England, formerly paid out of county rates."—In the half year ending the 31st of December, 1870, certain prosecutions took place at the assizes and quarter sessions of the county of L., and the costs were

MANDAMUS TO SERVANTS OF CROWN—cont.

taxed by the proper officers under the orders of the respective Courts, and the treasurer of the county paid the bills, and returned the bills, with the usual vouchers, to the Treasury. The Lords of the Treasury had appointed certain officers called the Examiners of Criminal Law Accounts, and these officers disallowed or reduced in amount fifty-one of the items in the bills returned; and a rule nisi was then obtained for a mandamus to the Lords of the Treasury, commanding them to issue a Treasury minute authorizing the payment of civil contingencies to pay to the treasurer of the county of L. the sums disallowed:—*Held*, that a mandamus would not lie, inasmuch as the Lords of the Treasury received the money, which was granted to Her Majesty, as servants of the Crown, and no duty was imposed upon them as between them and the persons to whom the money was payable.—*Held*, also, that the course which the Lords of the Treasury had pursued was erroneous, as they had no authority whatever to have the bills retaxed, and ought to have paid over to the treasurer of the county the full sum which he had expended as costs of prosecutions. **THE QUEEN v. THE LORDS COMMISSIONERS OF THE TREASURY** - - - - - 387

MANUFACTORY OF PRODUCT OF ORES AND MINERALS - - - - - 537

See **SMOKE**. 2.

MARINE INSURANCE—Assignment of policy, See **ASSIGNMENT OF POLICY**. [299]

—Carrier - - - - - 78
See **INSURANCE BY CARRIER**.

—Commencement of policy - - - 580, 702
See **COMMENCEMENT OF POLICY**. 1, 2.

—Concealment - - - - - 304
See **CONCEALMENT OF MATERIAL FACTS**.

MARKET—*Markets and Fairs Clauses Act, 1847* (10 Vict. c. 14), s. 13—*Selling or exposing for Sale within the Limits of a Market*—"Own Dwelling-place or Shop"—*Sale of Sheep by Auction*—"Right, Power, or Privilege," within s. 50 of *Local Government Act, 1858* (21 & 22 Vict. c. 98).] A market was duly opened in 1871 by the local board, under the *Local Government Act, 1858*, and the *Markets and Fairs Clauses Act, 1847*. The respondent was charged by the appellant with infringing s. 13 of the latter Act by selling twelve sheep in a place other than the market not being his own dwelling-place or shop. The justices refused to convict under the following facts:—The respondent had erected in 1865, under the approval of the local board, a large building called the "Agricultural Hall," capable of holding 100 head of cattle, with a large open yard with fixed pens capable of holding 1400 sheep. The hall and yard were the private property of the respondent, and in his own occupation. The respondent's dwelling-house adjoined and communicated with the yard. The respondent was in the habit of advertising, and holding sales by public auction every Monday, which is the market day, the average sale each Monday being about 100 cattle and 1000 sheep. The cattle and sheep so sold were the property of farmers and others, the respondent charging the vendors a commission and guarantee-

MARKET—continued.

ing payment of the amount of the sales. The offence proved was the sale of twelve sheep in the hall on a Monday, the hall being within the district of the board, and tolls being taken for the sale of sheep in the market:—*Held*, on appeal, that the justices ought to have convicted: for that the sale was not within the respondent's own shop within the meaning of s. 13.—*Held* also, that the respondent, by the establishment of his business under the approval of the local board, had not acquired any right, power, or privilege within s. 50 of the *Local Government Act, 1858*. **FEARON v. MITCHELL** - - - - - 590

MARKET TOLLS—*Non-Rateability*—*Tolls for Cattle coming into a Market-place.*] Tolls, authorized to be taken by an Act of Parliament, in respect of cattle brought into a market for sale, which become due as soon as the cattle are brought into the market-place, and before the cattle are put into a pen or tied up, are mere market-tolls, and not in the nature of stallage or tolls taken in respect of the use of the soil; and in assessing the lessee of the market and tolls to the poor-rate, in respect of his occupation of the market-place, such tolls cannot be taken into account as enhancing the value of the occupation. **THE QUEEN v. CASSWELL** - - - - - 328

MARKETS AND FAIRS CLAUSES ACT, 1847 [690]

See **MARKET**.

MARRIED WOMAN—Money received - 218
See **MONEY RECEIVED TO USE OF HUSBAND AND WIFE**.

—Municipal election - - - - - 361
See **ELECTION OF TOWN COUNCILLOR**.

—Slander - - - - - 112
See **SLANDER**.

MASTER AND SERVANT—Surety—Concealment - - - - - 666
See **DISCHARGE OF SURETY**. 1.

MASTER OF VESSEL—Duty—Cargo **Ex. Ch. 225**
See **DUTY OF MASTER OF VESSEL**.

MATERIAL FACTS—Concealment of - 304
See **CONCEALMENT OF MATERIAL FACTS**.

MEASURE OF DAMAGES—Ship—Cargo [Ex. Ch. 225]

See **DUTY OF MASTER OF VESSEL**.

METROPOLITAN BUILDING ACT, 1855 55
See "OWNER." 1.

METROPOLITAN POLICE DISTRICT—Penalties See **APPROPRIATION OF PENALTIES**. [433]

MINES—Injury by canal - - - 244
See **DUTY OF CANAL OWNER**.

—Support of surface - - - - - 716
See **SUPPORT**.

MISNOMER—Slip—Policy - **Ex. Ch. 517**
See **MISTAKE IN POLICY**.

MISTAKE IN POLICY—*Marine Insurance*—*Policy to cover Goods upon Ship or Ships to be declared—Misnomer—Effect of Slip of Policy*—30 Vict. c. 23, s. 7.] The plaintiffs, by order of K., at Hamburg, opened with the defendants a policy on hides by ship or ships to the extent of 5000*l*. The slip was signed on the 23rd of September, 1869, but the policy had not then been made out; on the 3rd of February, 1870, one of

MISTAKE IN POLICY—*continued.*

the plaintiffs went to the defendants' office, taking with him the slip for the 5000*l.* policy, and filled up two slips, one for 2455*l.* on hides, per *Socrates*, and another slip for 2500*l.* on hides by another vessel; he stated to the defendants' clerk that it would be more convenient to both parties to have two separate policies, instead of drawing up an open policy for 5000*l.*, and then declaring it on 4955*l.* The defendants' clerk acquiesced, and initialed the two slips, and afterwards the policies were executed by the defendants. There was a Norwegian ship, the *Socrates*, and a French ship, the *Socrate*, both described in the *Veritas*, the risk on the latter being greater than on the former. The hides insured by the policy were shipped on board the *Socrate*, and lost. At the trial the jury found that the parties, on entering into the contract, both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, and that the defendants did not mean only to insure hides on board the *Socrates*:—*Held*, affirming the judgment of the Queen's Bench, that the defendants, being bound on the 3rd of February to insure hides on board any ships selected by the plaintiffs, the misnomer was of no consequence, and the defendants were liable. By 30 Vict. c. 23, s. 7, no contract or agreement for sea insurance shall be valid, unless expressed in a policy:—*Held*, affirming the judgment of the Queen's Bench, that, notwithstanding that statute, the slip might be given in evidence, though not valid as a contract, as evidence of the intention of the parties. *IONIDES v. THE PACIFIC INSURANCE COMPANY* - - - **Ex. Ch. 517**

MONEY HAD AND RECEIVED—Husband and wife - - - - - **218**

See **MONEY RECEIVED TO USE OF HUSBAND AND WIFE.**

MONEY RECEIVED TO USE OF HUSBAND AND WIFE—*Parties to Action*—Husband and Wife—*Money borrowed for Wife's separate Use.*]

A married woman had property, freehold and leasehold, devised to her separate use, and she being desirous of building and repairing some cottages upon it, and her husband wishing to pay off a debt, it was arranged, under the advice of the defendant, a solicitor, that a loan of 550*l.* should be raised by the mortgage of the wife's property, and the deposit of two policies of 500*l.* each on the life of the husband and wife respectively. The mortgage was executed by husband and wife, and the husband covenanted for the repayment of the loan. The money was to be advanced by instalments, and a joint authority, signed by husband and wife, was given to the defendant to receive the first instalment of 150*l.* from the mortgagees. He received it, and paid the husband's debt by the authority of husband and wife, and he handed a small sum to them, but claimed to retain the balance for a previous debt due from the husband for professional services. Upon this an action was brought by husband and wife to recover the balance:—*Held*, that the action was maintainable: for that the defendant, having full knowledge of the objects of the loan, one of which was to appropriate a sum to the separate use of the wife, received the money under the joint authority, as agent of the husband and wife to carry into effect

MONEY RECEIVED TO USE OF HUSBAND AND WIFE—*continued.*

those objects; and he could not, against their will, treat the transaction as a reduction into possession by the husband; and the defendant, therefore, had no right to set up as an answer to the action that the money, when in his hands, was money of the husband alone. *JONES v. CUTHBERTSON* - **218**

MONEY PAID—Auctioneer - - - **310**

See **AUCTIONEER'S AUTHORITY.**

MUNICIPAL CORPORATION—Disqualification **[209]**

See **DISQUALIFICATION FOR TOWN COUNCILLOR.**

MUNICIPAL ELECTION—Married women's vote
See **ELECTION OF TOWN COUNCILLOR.** **[361]**

— Voting paper—Stamp - - - **463**

See **STAMP.**

MUSIC—Licence - - - **Ex. Ch. 588**

See **LICENCE FOR MUSIC.**

NAVIGATION—Lake—Obstruction - **166**

See **OBSTRUCTION OF NAVIGATION.**

NECESSARIES FOR SHIP—Jurisdiction - **658**

See **ADMIRALTY COURT JURISDICTION.**

"NECESSARY EXPENSE TO COMMAND RENT"

—*Poor-rate*—*Parochial Assessment Act* (6 & 7 Wm. 4, c. 96), s. 1—*Drainage Rate under Local Act.*] Under a local Act for the embanking and draining a district consisting of several parishes, an annual rate was imposed on the district, and lands occupied by the respondent were rated at a certain proportion yearly. The rate by the Act was expressly made a landlord's tax, and the respondent's landlord had accordingly always paid the amount. The whole rate under the Act was necessary for and was spent in each year in maintaining the drainage works. Without such drainage works, the land occupied by the respondent would have been under water at certain seasons, and the annual value would have been considerably diminished:—*Held*, that in assessing the respondent to the poor-rate, a deduction was to be allowed, under 6 & 7 Wm. 4, c. 96, s. 1, in respect of the drainage rate, as an expense necessary to maintain the land in a state to command the rent.

THE QUEEN v. GAINSBOROUGH UNION - **64**

NEGLECTANCE—Adjoining occupiers - **661**

See **DUTY OF ADJOINING OCCUPIERS.**

— Canal owner—Mines - - - **244**

See **DUTY OF CANAL OWNER.**

— Yew tree—Clippings - - - **31**

See **DUTY OF LANDOWNER.**

NET FOR TAKING GAME. Use of - - - **478**

See **POACHING PREVENTION ACT.**

"NEW STREET."—*Metropolis Management Act, 1855* (18 & 19 Vict. c. 120), s. 105—*Metropolis Management Amendment Act, 1863* (25 & 26 Vict. c. 102), s. 77—*"Owners of Lands"*—*Liability of Owners of Lands and House to pave new Street.*] The words "new street," as used in the *Metropolis Management Acts*, include a new street in the ordinary and popular sense of the term; and, therefore, a country lane, which was bounded by hedges and fields, and was repaired by the parish out of mind, becomes a new street within the meaning of that statute when houses are built along the sides of the lane.—*The Metropolis*

"NEW STREET"—continued.

Management Amendment Act, 1862, s. 77, provides that, where any vestry or district board shall have paved any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expense of paving the same:—*Held*, that the words "land bounding or abutting on such street" include the soil of private roads leading out of a new street.—Prior to the passing of the Metropolis Management Act, 1855, an ancient highway, which was a country lane, and had been repaired by the parish from time out of mind, existed in a district within the Act; after the passing of that statute, and before the passing of the Metropolis Management Amendment Act, 1862, twenty-one houses were built along the side of the lane, several of which belonged to P.; afterwards ninety houses were built along the sides of the lane. N. was the owner of the soil and freehold of five new private roads leading out of the lane; but he had no exclusive occupation or possession of them:—*Held*, that the lane, after the erection of the houses, became a "new street" within the meaning of the Acts; that P. and N. were the owners of land bounding or abutting thereon, and that they were liable to contribute to the expense of paving the same. *POUND v. PLUMSTEAD BOARD OF WORKS. LORD NORTHBROOK v. PLUMSTEAD BOARD OF WORKS* - - - 183

NOMINATION PAPER—Local board—Election
See "OWNER." 2. [26]

NONSUIT—Felony - - - 554
See FELONY.

NOTICE—Attorney—Admission - - - 587
See ADMISSION OF ATTORNEY.

— Local board—Election - - - 26
See "OWNER." 2.

NOTICE OF ASSESSMENT—Valuation—Metropolis Act - - - 653
See APPEAL AGAINST RATE.

NUISANCE—*Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), s. 8.* By s. 8 of 18 & 19 Vict. c. 121, the word "nuisances" shall include any premises in such a state as to be a nuisance or injurious to health. The appellants were the owners of a railway bridge over a highway. The rain-water collected on the bridge, and running through the planks, dripped on to the highway and on persons using the highway. The appellants were summoned, under s. 12 of the above Act, for allowing a nuisance to exist on their premises, and the justices ordered its abatement:—*Held*, that the Act, being a sanitary Act, applied only to such nuisances as were injurious to health; and that as the nuisance complained of was not injurious to health, the justices were wrong in ordering its abatement. *GREAT WESTERN RAILWAY COMPANY v. BISHOP* - - - 550

NUISANCE—Smoke - - - 474, 537, 545
See SMOKE, 1, 2, 3.

NUISANCES REMOVAL ACT, 1855. 474, 537,
See SMOKE, 1, 2, 3. [545.]

— - - - - 550
See "NUISANCE."

OBSTRUCTION OF NAVIGATION—*Trespass—Lake.* The plaintiff was the owner of the soil forming the bed of a navigable lake, and also of a

OBSTRUCTION OF NAVIGATION—continued.

pier which had been thereon erected wrongfully by a third person. The defendants, in common with the public, had the right of navigating the lake, and were the lessees, from the person who erected the pier, of the land adjoining that part of the lake where the pier was erected, and therefore had a right to embark and disembark, at the land leased by them, passengers using the defendants' boats on the lake. The pier was maintained by the plaintiff, and from its position prevented the defendants from getting with their boats to the land leased by them when landing and taking on board passengers:—*Held*, that the defendants were justified in causing passengers to pass and repass over the pier between their boats and the land leased by them. *MARSHALL v. THE ULLESWATER STEAM NAVIGATION COMPANY* 166

OCCUPIER - - - - - 418
See "OWNER." 3.

— Liability—Smoke - - - 474
See SMOKE, 1.

OFFER OF COMPENSATION - - - 776
See COMPENSATION UNDER LANDS CLAUSES ACT, 3.

ORDER OF REMOVAL—Appeal - - - 288
See APPEAL TO QUARTER SESSIONS.

ORE AND MINERALS—Manufactory—Smoke
See SMOKE, 2. [537]

ORNAMENTAL FRONTAGE—House—Conveyance - - - 748
See HOUSE.

OWN DWELLING PLACE OR SHOP - - - 691
See MARKET.

OWNER—*Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), ss. 3, 51. Liability to Fees to Surveyor.* The appellant, being seised in fee of certain building land situate within the limits of the Metropolitan Building Act, 1855, entered into an agreement with L. to grant leases of ninety-nine years of certain plots of the land, so soon as L. should have erected houses thereon, at a peppercorn until the 24th of June, 1870, and afterwards at £28 a year. L. built houses which were roofed in about September, 1870, and the appellant became entitled to receive the first quarter's ground rent on the 29th of September; the houses were surveyed by the respondent, the district surveyor, and he, on the 26th of October, 1870, delivered a bill for his fees to L., who afterwards became insolvent. The respondent afterwards claimed payment of his fees from the appellant:—*Held*, that the appellant was not liable to pay the respondent's fees, as he was not the "owner" of the houses within the meaning of ss. 3, 51; for that L., the lessee for ninety-nine years, whether he had a legal or only an equitable title, had the power to let the houses and receive the profits, and was therefore "owner." *CALDWELL v. HANSON* - - - 55

2. — *Public Health Act, 1848 (11 & 12 Vict. c. 63), ss. 20, 24—Election of Local Board of Health—To qualify as "Owner," fresh Notice necessary—Form of Nomination Papers.* By the Public Health Act, 1848 (11 & 12 Vict. c. 63) s. 20, at the election of members of a local board of

OWNER—continued.

health persons are entitled to vote either as rate-payers or owners of property in the district, or as both; . . . but "no owner shall be entitled to vote as such unless, fourteen days at least previously to the day of tendering his vote, he shall have delivered to the clerk a statement in writing of his name and address, and containing a description of the nature of his interest in the property giving the qualification." By s. 24, "any person entitled to vote may nominate for the office of member of the local board himself (if qualified to be elected), or any other person or persons so qualified (not exceeding the number of persons to be elected); and every such nomination shall be in writing, and shall state the names, residences, calling or quality of the persons nominated, and shall be signed by the party nominating." At an election of members of a local board of health, several persons were nominated in September, 1871: one of the candidates was nominated by M.; and the nomination paper was signed by M., "being duly qualified as owner in the district." M. had sent in the notice required as owner fourteen days before the election in 1870, and had not sent in a notice since; but he was still qualified in respect of the same property as owner. He was also qualified to vote as a ratepayer:—*Held*, that in order to be entitled to vote as owner, the notice required must be sent before each election, and the nomination by M. as owner was therefore bad; but that, as the statute did not require any particulars of qualification, but only the signature of the person nominating, "as owner," might be rejected as surplusage, and, M. being qualified as ratepayer, the nomination was good. *THE QUEEN v. MORGAN.* - - - 26

3. — *Sanitary Act, 1866* (29 & 30 Vict. c. 90), s. 21—*Nuisances Removal Act, 1855* (18 & 19 Vict. c. 121), ss. 2, 12—"Occupier." By s. 21 of the Sanitary Act, 1866, when a nuisance arises from the want or defective construction of structural work, before taking proceedings notice to do the necessary works is to be served on the "owner" of the premises on which the nuisance arises. "Owner" by s. 2 of the Nuisances Removal Act, 1855 (which is incorporated with the other Act) "includes any person receiving the rents of the property, in respect of which the word is used, from the occupier of such property, on his own account, or as trustee or agent for any other person." . . . A. was lessee for twenty-one years, at a rack rent, of a house and shop; he occupied the shop himself and underlet the upper part of the house to B. as a yearly tenant. The upper part was shut off from the shop, and A. had no access to it. There was a privy in the upper part of the house, which the nuisance authority took proceedings to abate, as a nuisance arising from a defective construction of a structural convenience; and they proceeded against C., who received the rent from A. as agent for A.'s landlord:—*Held*, that C. was not "owner," as he did not receive the rent from B. who was the occupier of the premises on which the nuisance arose, *COOK v. MONTAGU.* - - - - 418

— "New Street" - - - - 183
See "NEW STREET."

OWNER—continued.

— Summary proceeding against—Expense of improvement - - - 105
See ELECTION OF REMEDY.

OWNER OF SHIP DOMICILED IN ENGLAND

[658
See ADMIRALTY COURT JURISDICTION.

OXFORD—Corporation—Resident - 471
See RESIDENT.

PART PAYMENT—Statute of Limitations 493
See LIMITATIONS, STATUTE OF.

PARTIES TO ACTION—Husband and wife 218
See MONEY RECEIVED TO USE OF HUSBAND AND WIFE.

PAVING EXPENSES—"New street" - 183
See "NEW STREET."

PAYMENT—Agent—Undisclosed principal 598
See PAYMENT TO AGENT BY PRINCIPAL.

PAYMENT TO AGENT BY PRINCIPAL—*Principal and Agent—Liability of Undisclosed Principal.* A vendor, who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal, if the principal has bonâ fide paid the agent at a time when the vendor still gave credit to the agent and knew of no one else as principal.—*R. & Co.* were commission merchants, acting sometimes for themselves and sometimes as agents. Plaintiff, a merchant, had had dealings with them, and had never inquired whether they had principals or not, and had always settled with them. On the 15th of June plaintiff contracted to sell to *R. & Co.* 200 pieces of shirtings at a certain price, payment to be made in thirty days after delivery, without a discount of $1\frac{1}{2}$ per cent. Plaintiff delivered the shirtings (which were grey or unbleached shirtings), and the payment ought to have been made on Friday the 25th of August. On the 24th *R. & Co.* asked for delay till the next pay-day, September the 1st; and while plaintiff was considering what to do, *R. & Co.* on the 30th of August stopped payment. It turned out that *R. & Co.* had bought the goods for defendants under the following circumstances,—Defendants, merchants, had been in the habit of giving orders to *R. & Co.* for white and grey shirtings; when white were ordered *R. & Co.* went into the market, bought grey shirtings, had them bleached, and charged defendants with the price of the grey shirtings and of the bleaching, and 1 per cent. on the aggregate as their commission, with the charges of packing, &c. In previous transactions defendants had always paid *R. & Co.* generally in cash, i.e., on the next weekly pay-day, and had never been brought into communication with those who supplied or those who bleached the goods. In the present case defendants gave a verbal order for 200 white shirtings, the price not being named, nor the mode of payment. *R. & Co.* having received the grey shirtings from plaintiff, got them bleached, and sent them to defendants, charging the price at which they had bought of plaintiff, the cost of bleaching, and 1 per cent. on the aggregate of those two sums, with the charges of packing, &c.; and defendants, with perfect good faith, paid *R. & Co.* on the next pay-day after they received

PAYMENT TO AGENT BY PRINCIPAL—*cont.*

them, viz., on the 11th of August. On the above facts, the Court, having power to draw inferences:—*Held*, first, that the delay of plaintiff in taking no steps between the 25th and 30th of August was not laches such as would have precluded him, if otherwise entitled, from recovering payment from defendants; secondly,—assuming that there was authority, from the course of dealing between defendants and R. & Co., to establish privity of contract between defendants and those from whom R. & Co. obtained the goods,—that after the bona fide payment by defendants to R. & Co., at a time when plaintiff still gave sole credit to R. & Co. and knew of no one else as principal, plaintiff could not come upon defendants for the price. *ARMSTRONG v. STOKES*. 598

PECUNIARY LOSS—Bankruptcy—Cause of action—Passing to trustee - 611
See *BANKRUPTCY OF PLAINTIFF*.

PENALTIES—Appropriation—Metropolitan Police District - 433
See *APPROPRIATION OF PENALTIES*.

PIER—Trespass - 166
See *OBSTRUCTION OF NAVIGATION*.

PLYING FOR HIRE—Hackney carriage 423
See *HACKNEY CARRIAGE*.

POACHING PREVENTION ACT—(25 & 26 Vict. c. 114), s. 2—*Evidence of having used a Net for taking Game.*] The appellants were convicted, under 25 & 26 Vict. c. 114, s. 2, of having used a net for unlawfully taking game. The evidence was that the two appellants were seen by a policeman on the 16th of December on a highway, about half-past nine p.m. One had a net under his arm for catching hares. Nothing else was found on either of them; but they had a lurcher with them. The policeman had heard a dog yelping as if in chase of a hare or rabbit a little time before the defendants came along the road. The night was damp, and the net was wetfish:—*Held*, that there was evidence to support the conviction: for that it was not necessary that the appellants should have caught game; it was sufficient if they had used the net for the purpose, though unsuccessfully, of which there was evidence. *JENKIN v. KING* - 478

POLICY—Commencement - 580, 702
See *COMMENCEMENT OF POLICY*, 1, 2.

—Construction—Carrier - 78
See *INSURANCE BY CARRIERS*.

—Marine assurance—Assignment - 299
See *ASSIGNMENT OF POLICY*.

—Marine insurance—Ship - 304
See *CONCEALMENT OF MATERIAL FACTS*.

—On ship or ships—Mistake - *Ex. Ch.* 517
See *MISTAKE IN POLICY*.

POOR LAW—Irremovability - 467
See *IRREMOVABILITY OF POOR*.

—Order of removal—Appeal - 288

POOR LAW AMENDMENT ACT, 1867 - 288
See *APPEAL TO QUARTER SESSIONS*.

POOR RATE—Appeal - 653
See *APPEAL AGAINST RATE*.

—Assessment—Deduction - 64
See *NECESSARY EXPENSE TO COMMAND RENT*.

POOR RATE—*continued.*

—Market tolls - 328
See *MARKET TOLLS*.

—Rating of docks - 643
See *DOCKS*.

—Surface land - 334
See *SURFACE LAND*.

—Valuation - 83, 90
See *VALUATION (METROPOLIS) ACT, 1869*.

PRACTICE (COMMON LAW)—Appeal from justices - 545
See *SMOKE*. 3.

—Ejectment—Interrogatories - 239
See *INTERROGATORIES IN EJECTMENT*.

—Nonsuit—Felony - 554
See *FELONY*.

—Service—Foreign corporation - 293
See *FOREIGN CORPORATION*.

—Writ for service upon - 575
See *CAUSE OF ACTION*.

PRIVATE IMPROVEMENT EXPENSES—Recovery of - 105
See *ELECTION OF REMEDY*.

PRIVILEGE—Libel - 11
See *LIBEL*.

PRIVILEGED COMMUNICATION—Inspection
See *PRODUCTION OF DOCUMENTS*. [767]

PRODUCT OF ORES AND MINERALS Manu-
factory—Smoke - 537
See *SMOKE*. 2.

PRODUCTION OF DOCUMENTS—*Inspection—Privilege—Communications after Litigation contemplated—Discretion.*] Communications between a person and his solicitor or counsel, or any person acting as their deputy, with a view to obtain legal assistance and advice, are privileged, and the Court cannot compel them to be disclosed. Communications with any other person, although taking place after litigation is contemplated, are not necessarily privileged; but it is in the discretion of the Court to compel or abstain from compelling their production.—If such communications are substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the Court ought as a general rule to be to refuse inspection. Where they fall short of this, it should, as a general rule, be granted. *FENNER v. LONDON AND SOUTH EASTERN RAILWAY CO.* 767

PROHIBITION—Admiralty Court - 658
See *ADMIRALTY COURT JURISDICTION*.

PROPERTY PASSING—Sale by auction - 310
See *AUCTIONEER'S AUTHORITY*.

—Sale of goods - 436
See *GOODS AT RISK OF SELLER*.

PUBLIC HEALTH ACT, 1848 - 105
See *ELECTION OF REMEDY*.

PUBLIC PLACE—Hackney carriage—Plying for hire - 423
See *HACKNEY CARRIAGE*.

QUARTER SESSIONS—Appeal - 16
See *BASTARDY*.

—Appeal - 288
See *APPEAL TO QUARTER SESSIONS*.

QUIET ENJOYMENT, COVENANT FOR *Ex. Ch. 316**See COVENANT FOR QUIET ENJOYMENT.***RAILWAY COMPANY—Bridge—Nuisance** 550
See "NUISANCE."— Compensation - - - - 1
See COMPENSATION UNDER LANDS CLAUSES ACT, 2.— Superfluous lands - - - - 364
See SUPERFLUOUS LANDS.— "RATEABLE HEREDITAMENT" - - - 90
*See VALUATION (METROPOLIS) ACT, 1869.***RATEABLE VALUE—Iron mines—Surface lands**
See SURFACE LANDS. [334]**RATES—Appeal** - - - - 653
See APPEAL AGAINST RATE.— Assessment—Deduction - - - 64
See NECESSARY EXPENSE TO COMMAND RENT.— Iron mines—Surface lands - - - 334
See SURFACE LANDS.— Market tolls - - - - 328
See MARKET TOLLS.— Rateability of docks - - - - 643
See DOCKS.— Valuation - - - - 83, 90
*See VALUATION (METROPOLIS) ACT, 1869, 1, 2.***REGISTRATION—Trade union** - - - 741
See REGISTRATION OF TRADE UNION.

REGISTRATION OF TRADE UNION—Duty of Registrar where two Applications to register under the same Name—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 13—Regulations of Secretary of State.] By 34 & 35 Vict. c. 31, s. 6, any seven members of a trade union, by complying with the provisions of the Act as to registry, may register the union. By s. 13 (2) the registrar, upon being satisfied that the union has complied with the regulations as to registry in force under the Act, shall register the union; (3) no trade union shall be registered under a name identical with that under which any other existing trade union has been registered; (6) a secretary of state may from time to time make regulations respecting registry under this Act. The Home Secretary made regulations, (1) the registrar shall not register a trade union under a name identical with that of any other existing trade union known to him, whether registered or not; (2) upon application for the registration of a trade union already in operation, the registrar, if he has reason to believe that the applicants have not been duly authorized by the union, may, for the purposes of ascertaining the fact, require from the applicants such evidence as may seem necessary.—A trade union, which had been some years in operation, became divided into two sections, each section claiming to have the governing body among them. Both sections applied to register the trade union by the name which the society had always gone by. The registrar heard evidence voluntarily given by each party, and finding there was a bona fide dispute, refused the trade union under either application until the decision of a competent Court determined the legal status of the applicants. On rule for a mandamus, obtained by the parties first applying, to compel the registrar to

REGISTRATION OF TRADE UNION—continued.

register the union on their explanations:—*Held*, that (irrespective of the regulations) the registrar was right, under the Act, in refusing to register, so as not to alter the position of the parties.—*Semble*, that the regulations were not ultra vires. **THE QUEEN v. THE REGISTRAR OF FRIENDLY SOCIETIES** - - - - 741

REINSURANCE—Commencement of policy 580
See COMMENCEMENT OF POLICY. 1.

REMOVAL OF POOR—Appeal - - - 288
See APPEAL TO QUARTER SESSIONS.

— Pauper - - - - 467
See IRREMOVABILITY OF POOR.

RENEWAL OF NOTICE—Attorney—Admission
See ADMISSION OF ATTORNEY. [587]

RES JUDICATA—Recovery of interest - - 493
See LIMITATIONS, STATUTE OF.

"RESIDENT"—Corporation of Oxford—17 & 18 Vict. c. 81, ss. 16 & 48.] Sect. 16 of 17 & 18 Vict. c. 81, provides, that the congregation of the University of Oxford shall be composed of the chancellor and certain persons, and also of "all residents." Sect. 48 provides that the word "residents" shall mean and include all members of convocation who shall have resided twenty weeks within one mile and a half of Carfax during the year that shall expire on the 1st of September next preceding the making of the register. E. was the vicar of F., which was distant nine miles from Oxford, and he resided at the parsonage house; but he rented a set of rooms within St. John's College (of which he was a resident fellow), which he had furnished, and for which he paid rent, and which were not occupied by any one else. When he visited Oxford, he sometimes slept there, but he generally returned to F. the same day:—*Held*, that there must be an actual as distinguished from a constructive residence, and that E. was not a resident within the meaning of s. 48. **THE QUEEN v. THE VICE-CHANCELLOR OF OXFORD** 471

RESTRAINT OF PRINCES—Charterparty—Breach [404]

See BREACH OF DUTY BY SHIPOWNER.

"RIGHT, POWER OR PRIVILEGE" - - - 690
See MARKET.

SALARY OF CORONER - - - - 207
See COUNTY CORONER.

SALE BY AUCTION—Distress - - - 310
See AUCTIONEER'S AUTHORITY.

SALE OF GOODS—Cargo expected to arrive
[*Ex. Ch. 139*]
See CARGO EXPECTED TO ARRIVE.

— Property passing - - - - 436
See GOODS AT RISK OF SELLER.

— Undisclosed principal—Payment to agent
[598]
See PAYMENT TO AGENT BY PRINCIPAL.

SANITARY ACT, 1866 - - - 474, 537, 545
See SMOKE. 1, 2, 3.

SERVANTS OF CROWN—Mandamus - - 387
See MANDAMUS TO SERVANTS OF CROWN.

SERVICE OF WRIT—Foreign corporation 293
See FOREIGN CORPORATION.

SET-OFF—*Bankrupt—Equitable Claim on Fund sought to be set off—Executor.* A banking firm stopped payment in July 1870, and were at once adjudged bankrupt. At the time of the stoppage defendant had an account with the bank, which he had overdrawn about 300*l.* At the end of 1869 a Mrs. A. had died, appointing defendant sole executor of her will, and leaving a balance of about 600*l.* in the hands of the bank. This balance was at once transferred by the bank from the account of Mrs. A. to the account of defendant, "executor of the late Mrs. A." In the interval before the stoppage defendant had drawn out about 200*l.* of this account, and paid in about 100*l.*, leaving a balance in defendant's favour of about 500*l.* The defendant was left sole residuary legatee by Mrs. A.'s will. There were several pecuniary legacies which defendant had paid at the date of the stoppage of the bank; but there was a sum of 800*l.* to be invested for the benefit of certain persons, and an annuity of 100*l.* charged on the real and personal estate; and at the date of the bankruptcy defendant had not specifically provided for these two bequests; but there were in the hands of defendant, besides the balance in the bank, other personal assets of the testatrix; and after providing for these bequests, there would have been a surplus of 1900*l.*, to which defendant was entitled as residuary legatee.—The plaintiff, as trustee of the bankrupts' estate, having brought an action against defendant to recover the amount of his overdrawn account, defendant sought to set off the balance in his favour on the executorship account:—*Held*, that the transfer of the balance of the deceased's account to the account of the defendant, as executor, was equivalent to defendant drawing out the whole amount and paying the same amount into a fresh account, and created a personal debt for money lent between defendant and the bank; that the effect of it being opened as an executorship account was to affect the bank with notice if there were any equities attaching to the fund; but that under the circumstances there were no such equities as to prevent defendant treating the balance as a fund to which he was beneficially as well as legally entitled; and that, consequently, defendant was entitled to set it against the plaintiff's claim. *BAILEY v. FINCH* [34

— Judgment—Solicitor's lien - - - 499
See SOLICITOR'S LIEN.

SEVERANCE—Injurious affection—Compensation [728
See COMPENSATION UNDER LANDS CLAUSES ACT. 4.

SHERIFF—False return - - - 175
See FALSE RETURN.

SHIP—Bill of lading—Steamship - - - 566
See STEAMSHIP.

— Cargo expected to arrive - Ex. Ch. 139
See CARGO EXPECTED TO ARRIVE.

— Charterparty—Breach - - - 404
See BREACH OF DUTY BY SHIPOWNER.

— Charterparty—Ceasing of liability - 509
See CEASING OF LIABILITY ON CHARTER.

— Duty of master—Cargo - Ex. Ch. 225
See DUTY OF MASTER OF VESSEL.

SHIP—continued.

— Insurance—Commencement of policy [580, 702
See COMMENCEMENT OF POLICY. 1, 2.

— Insurance—Mistake - - - Ex. Ch. 517
See MISTAKE IN POLICY.

— Owner domiciled in England - - - 658
See ADMIRALTY COURT JURISDICTION.

SHIP OR SHIPS POLICY—Mistake Ex. Ch. 517
See MISTAKE IN POLICY.

"SIDES OF CARRIAGE OR CART-WAY" 69
See ENCROACHMENT.

SLANDER—*Married Woman—Imputation of Unchastity—Special Damage—Action by Husband and Wife—Loss of Hospitality of Friends.* Declaration, by husband and wife, charged a slander imputing want of chastity to the wife, whereby she was "injured in her character and reputation, and became alienated from and deprived of the cohabitation of her husband, and lost and was deprived of the companionship, and ceased to receive the hospitality of divers friends, and especially of her husband," and others named, who had "by reason of the premises withdrawn from the companionship and ceased to be hospitable to or friendly with her":—*Held*, on demurrer, that the loss of the hospitality of friends was the reasonable and natural consequence of the slander, and a loss to the wife herself of benefits which her husband was not bound to bestow upon her; and, therefore, that such loss of hospitality was special damage which would support an action by husband and wife. *DAVIES AND WIFE v. SOLOMON* - 112

SLIP—Policy—Concealment - - - 304
See CONCEALMENT OF MATERIAL FACTS.

— Policy—Insurance - - - Ex. Ch. 517
See MISTAKE IN POLICY.

SMOKE—*Nuisance Removal Acts, 18 & 19 Vict. c. 121, s. 12; 23 & 24 Vict. c. 77, s. 13; 29 & 30 Vict. c. 90, s. 14—Black Smoke from Mill Chimney—Occupier of Premises—Liability of.* 18 & 19 Vict. c. 121, s. 12, and 23 & 24 Vict. c. 77, s. 13, enact that upon complaint of a nuisance being made to a justice he shall "issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or, if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises to appear before any two justices . . . who shall proceed to inquire into the said complaint, and if it be proved to their satisfaction that the nuisance exists, or . . . if removed or discontinued, that it is likely to recur or be repeated," they may make an order "on such person, owner, or occupier for the abatement" thereof. The respondents were summoned for sending forth black smoke, on a certain day, from a chimney of premises belonging to them (not being the chimney of a private dwelling-house) in such quantity as to be a nuisance within 29 & 30 Vict. c. 90, s. 19, and the above statutes. At the hearing proof was given that black smoke issued from the chimney on the day named so as to be a nuisance, and that the premises were in the occupation of the respondents and used as a factory. No evidence was adduced to shew that any inquiry had been made to find out who had charge of the furnaces causing the smoke at the

SMOKE—continued.

time of the emission, and the justices, therefore, discharged the respondents:—*Held*, that the respondents were properly summoned, as the persons by whose permission the nuisance arose, and were responsible as such, if the person causing the smoke to issue was their servant. *BARNES v. AKROYD* - - - - - 474

2. — *Sanitary Act, 1866* (29 & 30 Vict. c. 90), part 22, ss. 14, 19—*Nuisances Removal Act, 1855* (18 & 19 Vict. c. 121), ss. 12, 44—*Smoke or other Nuisance in Manufactory of Product of Ores and Minerals.*] By s. 14 of the Sanitary Act, 1866, (29 & 30 Vict. c. 90), part 2 of that Act is to be construed as one with 18 & 19 Vict. c. 121. By s. 19 “nuisances” under the above Act shall include any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the combustible used in any mill, factory, dyehouse, brewery, bakehouse, or gasworks, or in any manufactory or trade process whatsoever. Any chimney (not of a private dwelling) sending forth black smoke in such quantity as to be a nuisance. By s. 8 of 18 & 19 Vict. c. 121, certain things are defined as nuisances; and by s. 12, proceedings may be taken by the local authority before justices to abate nuisances ascertained to exist; and by s. 44 of that Act, “the provisions of this Act shall not extend or be construed to extend to mines of different descriptions, so as to interfere with or obstruct the efficient working of the same, or to the smelting of ores and minerals, or to the manufactory of the produce of such ores and minerals.”—*Held*, by Blackburn and Mellor, J.J. (Lush, J., dissenting), that, construing the two Acts as one, as required by s. 14 of the latter Act, the proviso in s. 44 of the earlier Act must apply to all nuisances in s. 19 of the later Act as well as to nuisances in s. 8 of the earlier Act; so that works for the manufacturing of the produce of ores and minerals are entirely exempt from the operation of the two Acts; and that, therefore, justices had no jurisdiction to order the abatement of smoke issuing out of the chimney of a bichrome manufactory. *NORRIS v. BARNES* 537

3. — *Nuisances Removal Act, 1855* (18 & 19 Vict. c. 121)—*Sanitary Act, 1866* (29 & 30 Vict. c. 90)—*Sending forth Black Smoke—Order of Abatement—Disobedience to—Separate Acts—Single Summons—Multiplication of Costs—Discretion of Justices—Rule to state Case.*] Justices acting in pursuance of the Nuisances Removal Act, 1855, and the Sanitary Act, 1866, ordered the occupiers of certain premises to cease to send forth black smoke from their chimney, so that the same should be no longer a nuisance. The order having been persistently disregarded, and the offenders summoned and a penalty imposed on them, under s. 14 of the Act of 1855, for their default, nineteen separate informations were eventually laid, and the same number of summonses simultaneously issued, in respect of as many acts of disobedience, each committed on a different day, by sending forth black smoke. At the hearing of the summonses, the full penalty of 10s. was imposed for the offence alleged in each, and the offenders were ordered also to pay 15s. costs upon the first summons, and 16s. costs upon every other. They objected that their disobedience was but one

SMOKE—continued.

default, and that the divers acts complained of should have been charged in a single summons, to which one set of costs only would have attached; and they obtained a rule calling on the justices to shew cause why they should not state a case under 20 & 21 Vict. c. 43:—*Held*, that each daily emission of smoke was a separate act of disobedience, for which a separate summons might be lawfully issued, and that, under the circumstances, the justices had not so exercised their discretion in awarding costs as to render the interference of the Court necessary.—*Semble*, that, had they done so, the proper remedy would not be by ruling them to state a case. *THE QUEEN v. WATERHOUSE* - - - - - 545

SOLICITOR—Admission—Notice - - - 587
See *ADMISSION OF ATTORNEY.*

— **Articled clerk** - - - - - 297
See *ARTICLED CLERK.*

— **Lien—Judgment** - - - - - 499
See *SOLICITOR'S LIEN.*

SOLICITOR'S LIEN—Attorney and Client—Set-off of Judgments.] Declaration on orders having the force of judgments of nonsuit, in suits which defendant had brought against plaintiff in Ireland. Plea of set-off on judgments recovered by defendant against plaintiff in Ireland. Replication on equitable grounds, that defendant ought to be allowed to set off against plaintiffs' claim the amount mentioned in the plea, because plaintiff retained one C. as his attorney to conduct his defence in the suits in the declaration mentioned, and plaintiff owes him the full amount of the costs, and C. has a lien upon the orders, and the amounts are therefore due from defendant to plaintiff as trustee for C., and plaintiff sues as such trustee. On demurrer:—*Held*, that the replication was bad: for that the fact, that an attorney had obtained a judgment for a client, and that costs were due to the attorney, did not raise the relation of trustee and cestui que trust between the client and the attorney with respect to the proceeds of such judgment; and the so-called lien of the attorney is merely a claim to the protection of the Court as to his costs when the equitable interference of the Court is asked for the purpose of setting off one judgment against another.—*Ex parte Cleland* (Law Rep. 2 Ch. App. 808) commented upon. *MERCER v. GRAVES* - - - - - 499

SPECIAL DAMAGE—Slander—Married woman
See *SLANDER* - - - - - 112

SPECIAL SESSIONS—Alehouse—Licence
[482, 487, 490]
See *LICENCE TO ALEHOUSE, 1, 2, 3.*

STALLS—Custom to erect - - - - - 214
See *STATUTE FAIR.*

STAMP—Voting Papers—Municipal Elections—Stamp Act, 1870 (33 & 34 Vict. c. 97), ss. 3, 102, & sch.—7 Wm. 4 & 1 Vict. c. 78, ss. 13, 14.] The Stamp Act, 1870 (33 & 34 Vict. c. 97; ss. 3, 102, & sch.)—which imposes a penny stamp on “Voting paper. Any instrument for the purpose of voting by any person entitled to vote at any meeting,”—does not extend to voting papers used, under 7 Wm. 4 & 1 Vict. c. 78, ss. 13, 14, at a meeting of the town council of a municipal borough for the election of alderman. *THE QUEEN v. STRACHAN* - [463

STAMP—Marine Insurance—Slip - 304
See CONCEALMENT OF MATERIAL FACTS.

STATUTE FAIR—Custom—Custom to erect Stalls at Statute Sessions for hiring Servants, *bad*—*Claim of Right*.] Appellant was charged under 5 & 6 Wm. 4, c. 50, s. 72, with obstructing a public foot-way. He had put up a stall for the sale of refreshments at a statute sessions for the hiring of servants; this had been done for more than fifty years, and the statute sessions had been held before 5 Eliz. c. 4. Appellant, thereupon, contended that he had a right by custom to erect his stall in the same way as at a fair, or, at all events, that he *bonâ fide* claimed such a right, and the justices' jurisdiction was therefore ousted. The justices having convicted appellant:—*Held*, that the justices were right: for that, as the statute sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edw. III, there could be no such custom by immemorial usage as was claimed. *SIMPSON v. WELLS* [214

STATUTE OF FRAUDS - - - Ex. Ch. 196
See FRAUDS, STATUTE OF.

STATUTE OF LABOURER - - - 214
See STATUTE FAIR.

STATUTE OF LIMITATIONS - - - 493
See LIMITATIONS, STATUTE OF.

STATUTES.

- 21 Jac. 1, c. 16, s. 3 - - - 493
See LIMITATIONS, STATUTE OF.
- 29 Car. 2, c. 3, s. 4 - - - Ex. Ch. 196
See FRAUDS, STATUTE OF.
- 17 Geo. 2, c. 38 - - - 653
See APPEAL AGAINST RATE.
- 25 Geo. 2, c. 36, ss. 2, 3 - - - Ex. Ch. 588
See LICENCE FOR MUSIC.
- 9 Geo. 4, c. 61 - - - 482, 487, 490
See LICENCE TO ALEHOUSE. 1, 2, 3.
- 5 & 6 Wm. 4, c. 50, s. 72 - - - 47
See WAY, DEDICATION OF.
- c. 76, s. 37 - - - 219
See DISQUALIFICATION FOR TOWN COUN-
 CILLOR.
- 6 & 7 Wm. 4, c. 37, s. 8 - - - 135
See ADULTERATION OF BREAD.
- 6 Wm. 4, c. 96, s. 1 - - - 64
See NECESSARY EXPENSE TO COMMAND
 RENT.
- 7 Wm. 4, & 1 Vict., c. 78, ss. 4, 15 - - 219
See DISQUALIFICATION FOR TOWN COUN-
 CILLOR.
- ss. 13, 14 - - - 463
See STAMP.
- 2 & 3 Vict. c. 71, s. 47 - - - 433
See APPROPRIATION OF PENALTIES.
- 3 & 4 Vict. c. 84, s. 6 - - - 433
See APPROPRIATION OF PENALTIES.
- 6 & 7 Vict. c. 63, s. 8 - - - 297
See ARTICLED CLERK.
- 7 & 8 Vict. c. 101, ss. 2, 4 - - - 16, 773
See BASTARDY. 1, 2.
- 8 Vict. c. 10, s. 6 - - - 16
See BASTARDY.

STATUTES—*continued*.

- 8 Vict. c. 18 - - - 1, 728, 776, Ex. Ch. 143
See COMPENSATION UNDER LANDS CLAUSES
 ACT. 1, 2, 3, 4.
- s. 137 - - - 364
See SUPERFLUOUS LANDS.
- 9 & 10 Vict. c. 66, s. 1 - - - 467
See IRREMOVABILITY OF POOR.
- 10 Vict. c. 14, s. 13 - - - 690
See MARKET.
- 11 & 12 Vict. c. 43, s. 11 - - - 105
See ELECTION OF REMEDY.
- c. 63, ss. 20, 24 - - - 26
See "OWNER." 2.
- ss. 69, 96 - - - 105
See ELECTION OF REMEDY.
- 15 & 16 Vict. c. 76, s. 18 - - - 573
See CAUSE OF ACTION.
- 17 & 18 Vict. c. 36, s. 1 - - - 157, 700
See AFFIDAVIT WITH BILL OF SALE. 1, 2.
- c. 81, ss. 16, 48 - - - 471
See "RESIDENT."
- 18 & 19 Vict. c. 120, ss. 96, 98 - - - 47
See WAY, DEDICATION OF.
- c. 120, s. 105 - - - 183
See NEW STREET.
- c. 121 - - - 474, 537, 545
See SMOKE. 1, 2, 3.
- ss. 2, 12 - - - 418
See "OWNER." 3.
- s. 8 - - - 550
See "NUISANCE."
- c. 122, ss. 3, 51 - - - 55
See "OWNER."
- 21 & 22 Vict. c. 98 - - - 105
See ELECTION OF REMEDY.
- - - - 690
See MARKET.
- 23 & 24 Vict. c. 77, s. 13 - - - 474
See SMOKE. 1.
- c. 116, s. 4 - - - 217
See COUNTY CORONER.
- c. 139, ss. 2, 4 - - - 429
See GUNPOWDER. 2.
- ss. 6, 7 - - - 61
See GUNPOWDER. 1.
- 24 Vict. c. 10, s. 5 - - - 658
See ADMIRALTY COURT JURISDICTION.
- 24 & 25 Vict. c. 61, s. 23 - - - 105
See ELECTION OF REMEDY.
- 25 & 26 Vict. c. 103 - - - 90
See VALUATION (METROPOLIS) ACT, 1869.
- c. 102, s. 77 - - - 183
See NEW STREET.
- c. 114, s. 2 - - - 478
See POACHING PREVENTION ACT.
- 27 & 28 Vict. c. 39 - - - 90
See VALUATION (METROPOLIS) ACT, 1869.
- c. 101, s. 51 - - - 69
See ENCROACHMENT.
- 29 & 30 Vict. c. 39, s. 14 - - - 387
See MANDAMUS TO SERVANTS OF CROWN.
- c. 96 - - - 474, 537, 545
See SMOKE. 1, 2, 3.

STATUTES—continued.

29 & 30 Vict. c. 90, s. 21	- - -	418
See "OWNER." 3.		
30 Vic. c. 23, s. 7	- - -	Ex. Ch. 517
See MISTAKE IN POLICY.		
30 & 31 Vict. c. 106, s. 27	- - -	288
See APPEAL TO QUARTER SESSIONS.		
31 & 32 Vict. c. 86, s. 1	- - -	299
See ASSIGNMENT OF POLICY.		
32 & 33 Vict. c. 18, s. 1	- - -	776
See COMPENSATION UNDER LANDS CLAUSES ACT. 3.		
— c. 55, s. 9	- - -	361
See ELECTION OF TOWN COUNCILLOR.		
— c. 67	- - -	83, 90
See VALUATION (METROPOLIS) ACT, 1869.		
— s. 9	- - -	653
See APPEAL AGAINST RATE.		
— c. 70, ss. 57, 103, 108	- - -	416
See JUSTICES' JURISDICTION. 2.		
— c. 71	- - -	527
See LICENCE TO SEIZE GOODS.		
33 & 34 Vict. c. 97, ss. 3, 102, & sch.	- - -	463
See STAMP.		
— c. 93	- - -	361
See ELECTION OF TOWN COUNCILLOR.		
34 & 35 Vict. c. 31, s. 13	- - -	741
See REGISTRATION OF TRADE UNION.		
— c. 89	- - -	387
See MANDAMUS TO SERVANTS OF CROWN.		

"STEAMSHIP"—*Bill of Lading, Construction of Contract—Description of Vessel.* Goods were shipped by plaintiffs on board defendants' vessel, under a bill of lading, "shipped on board the steamship *Hibernia* . . . from Singapore to London . . . with liberty to call at any ports, in or out of the route, to receive and discharge coals, . . . &c., and to tranship the goods by any other steamer";—*Held*, that the contract of the defendants was that the goods should be carried on board a ship in which the principal motive power during the voyage should be steam. *FRASER v. THE TELEGRAPH CONSTRUCTION AND MAINTENANCE COMPANY* 566

SUMMARY CONVICTION—Implied jurisdiction

See JUSTICES' JURISDICTION. 2. [416]

SUMMONS—Nuisance—Repeated summonses 545

See SMOKE. 3.

SUPERFLUOUS LANDS—Railway—Lands acquired under the Act—Limits of Deviation—Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18) s. 127—Lands already vested not divested by Subsequent Statute. By s. 127 of the Lands Clauses Consolidation Act, 1845, lands acquired by a company under the Act, but not required for the purposes of the Act, are to be sold within a prescribed period; and superfluous lands remaining unsold at the expiration of the time limited are "thereupon to vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same." The defendants, a railway company, after notice to treat, purchased, by agreement, land of the plaintiffs, which was marked upon the plans deposited as being partly within and partly beyond the limits of deviation; on part of the land they constructed their railway,

SUPERFLUOUS LANDS—continued.

and on part deposited chalk and spoil, which in making the railway was excavated from a cutting. After the construction of the railway, the defendants, for several years, let the land on which the chalk was deposited, to tenants paying rent:—*Held*, that the whole of the land was land acquired under the Act, and was superfluous land, which, remaining unsold after the prescribed period, vested in the owners of the adjoining lands.—By a subsequent Act obtained by the defendants, they were empowered to retain and hold any lands belonging to them, and which had not yet been applied to the purposes of the company, for a period of ten years after the passing of the Act:—*Held*, that this enactment did not defeat a right to unsold superfluous land, which had vested, under the Lands Clauses Consolidation Act, at the expiration of the time limited, before the passing of the subsequent Act. *MAY v. THE GREAT WESTERN RAILWAY COMPANY* - - - 364

SUPPORT—Grant of Mines, Construction of—Right to let down Surface. Declaration for mining under the plaintiff's land without leaving proper support, whereby the foundations of plaintiff's mill and other buildings gave way, and the buildings fell. Plea, that S., the plaintiff's predecessor in title, was seised in fee of the said land, &c., and of the subjacent mines, and by an indenture of lease between S. and certain persons as lessees, S. demised for thirty-eight years, from the 25th of March, 1839, all the veins of minerals that should or might at any time be found or discovered under the said land, with full power to the lessees and assigns to get the minerals from the old pits, and sink fresh pits, they, the lessees and assigns, making reasonable satisfaction to the lessor and his tenants for the damage done to them respectively by the surface of the lands being covered with rubbish or otherwise injured, or as he or they might sustain, as well by the injury done to the lands in sinking and getting the mines and minerals, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the lessor, by getting the minerals under or near to any of the dwelling-houses or other buildings according to the covenant therein-after contained for that purpose, (to wit) in case any damage or injury during the term hereby granted shall happen to any of the dwelling-houses, cottages, or other buildings, already erected, or to be hereafter erected on the land in lieu of the present buildings, and not of greater value than the present buildings were when erected, by reason of any minerals being got under them, or so near to them as to occasion such damage or injury, the lessees and assigns shall at their own cost, on six days' notice by the lessor or assigns, or his tenants, rebuild or repair any such buildings so damaged and injured, and put them in as good condition and repair as they were before the damage was done. And further, that the lessees and assigns shall every year during the term pay to the lessor, besides the immediate damage to be paid to the tenant, at the rate of 40s. an acre for the damage done to the crops, &c., for the first five years, and such a price as arbitrators shall determine as rent for each acre that shall be damaged, after which the lessees shall have free use of the land during the residue of the term. The plea

SUPPORT—continued.

concluded with an allegation that the defendants became assignees of the lease, and were always ready and willing to perform the covenant. On demurrer:—*Held*, that the plea was good: for that the terms of the lease were sufficient to shew by implication that it was intended that the lessees of the mines should have the right to work the mine so as to undermine the surface, subject only to paying damages according to the covenants.

SMITH v. DARBY - - - - 716

SURETY—Discharge - - - - 666, 756

See DISCHARGE OF SURETY. 1, 2.

SURFACE—Support—Mines - - - 716

See SUPPORT.

SURFACE LAND—*Poor-rate*—*Rateability of Surface Land and Buildings, &c., connected with Iron Mines—Mode of ascertaining rateable Value.* The appellant was the owner of iron mines, and he rented two acres and a half of surface land partly over and partly adjoining the mines; he occupied the mines and land together, using the surface for the purpose of working the mines and getting the ore, and he had erected thereon buildings, machinery, workshops, and tramways. The surface land, buildings, &c., without the mines, would be practically valueless:—*Held*, that the appellant was rateable to the poor-rate in respect of the surface land with the buildings, machinery, workshops, and tramways, although they were occupied in connection with a non-rateable subject-matter, viz., an iron mine. That the way to ascertain the rateable value was to assume the mines and surface to be in different hands, and then to calculate what rent the occupier of the mine would have to pay for the surface with the buildings, &c., erected thereon.—*Rez v. Bilston* (5 B. & C. 851) discussed. GUEST v. OVERSEERS OF EAST DEAN - - - - 334

SURVEYOR'S FEES—"Owner" - - - 55

See "OWNER." 1.

TAXATION OF COSTS—Compensation - 776

See COMPENSATION UNDER LANDS CLAUSES ACT. 3.

"TAXED CART"—*Turnpike Toll.* By a local Turnpike Act of 15 & 16 Vict. a larger toll was imposed on certain carriages, including "taxed cart," than on others:—*Held*, that "taxed cart" meant a taxed cart as defined by 43 Geo. 3, c. 161, Sch. (D.) No. 4.—*Purdy v. Smith* (1 E. & E. 511; 28 L. J. (M.C.) 150) dissented from. WILLIAMS v. LEAR [285

TITLE OF BAILEE—*Detinue*—*Bailor and Bailee—Wharfinger—Warrants.* Certain cases of wine were ordered by L. of the plaintiff, and were shipped by the plaintiff consigned to L., who deposited the bill of lading with the defendant, a wharfinger, with directions to take delivery and warehouse the wine on L.'s account. The wine, on its arrival, was entered at defendant's wharf in L.'s name, subject to a stop for the freight. L. afterwards refused to accept the wine on the ground that it was not according to contract; the plaintiff agreed to take it back, and L. promised to send a delivery order to enable the plaintiff to obtain it; but on the same day L. indorsed the bill of lading to M., which M. took to the defendant's wharf and secured a transfer of the wine into his own name.

TITLE OF BAILEE—continued.

The plaintiff was afterwards informed by L. that the wine was at the disposal of the plaintiff, but subject to charges amounting to 17l. 14s. 9d., and 5l. for loss of profit. At an interview between M. and the plaintiff M. offered to give up the wine on payment of the above sums. The plaintiff tendered the former sum, which M. would not accept. The plaintiff's attorney afterwards offered to the defendant to pay all charges, and to indemnify him against the claim of any other person. The defendant refused to deliver the wine to the plaintiff, alleging that he had given warrants to M. The wine was ultimately delivered to a third person by M.'s order. M. had in fact paid the freight, and obtained warrants to him or his order. The jury found that the transaction between M. and L. was colourable and with knowledge on the part of M. of the intention of L. to deprive the plaintiff of the wine:—*Held*, power having been reserved to the Court to draw inferences of fact, that the defendant received the wine as bailee to L., and after the payment of the freight could have no better title than his bailor; that by the finding of the jury M. had no better title than L.; and, as the plaintiff had tendered the amount of charges both to M. and the defendant, the plaintiff's title was as valid against the defendant as it would have been against L.; and that the defendant was liable to the plaintiff for the value of the wine.

BATUT v. HARTLEY - - - - 594

TOLL—"Taxed cart" - - - - 285

See "TAXED CART."

TOLLS—Rateability - - - - 328

See MARKET TOLLS.

TOWN COUNCILLOR—Election - - - 361

See ELECTION OF TOWN COUNCILLOR.

TRADE UNION—Registration - - - 741

See REGISTRATION OF TRADE UNION.

TRADE UNION ACT, 1871 - - - - 741

See REGISTRATION OF TRADE UNION.

TRESPASS—Pier - - - - 166

See OBSTRUCTION OF NAVIGATION.

TROVER—Conversion—Broker - - - 616

See CONVERSION.

TURNPIKE—Toll—"Taxed cart" - - 285

See "TAXED CART."

UNDISCLOSED PRINCIPAL—Payment to agent [598

See PAYMENT TO AGENT BY PRINCIPAL.

UNION ASSESSMENT ACT—Valuation - 90

See VALUATION (METROPOLIS) ACT, 1869. 2.

UPPER AND LOWER FLOOR—Occupiers—Escape of water - - - - 661

See DUTY OF ADJOINING OCCUPIERS.

USAGE—Contract—Agent - - - - 126

See CUSTOM OF MARKET.

VALUATION—Metropolis - - - - 83, 90

See VALUATION (METROPOLIS) ACT, 1869. 1, 2.

VALUATION LIST—Poor-rate—Appeal - 653

See APPEAL AGAINST RATE.

— Metropolis - - - - 83, 90

See VALUATION (METROPOLIS) ACT, 1869. 1, 2.

VALUATION (METROPOLIS) ACT, 1869—(32 & 33 Vict. c. 67), ss. 45, 54—*Valuation List—Exceptional Principles of Valuation.*] In making out the valuation list under the Valuation (Metropolis) Act, 1869, the gross value and rateable value, as defined by s. 4, of each hereditament, must be inserted, without reference to any privilege of being assessed on an exceptional principle of valuation. *THE QUEEN v. THE GOVERNORS OF THE FOUNDLING HOSPITAL* - - - 83

—(32 & 33 Vict. c. 67)—*Union Assessment Committee Acts, 1862 and 1864* (25 & 26 Vict. c. 103 and 27 and 28 Vict. c. 39)—“*Rateable Hereditament*”—“*Westminster Chambers.*”] The Westminster Chambers consist of seven blocks of buildings, having seven principal entrances. Each block is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance. The blocks are structurally divided into 117 different sets of rooms, which are quite distinct from each other, like chambers in the Inns of Court, and are capable of being let and occupied separately as residences or offices. Each set has an outer door opening on to one of the internal staircases, and also an inner private hall or passage. There is no means of communication between the sets except the internal staircase. The outer or street door to each block is kept locked at night, and a porter, who is hired by the lessors, resides in a distinct set of rooms in the basement of each block, and has a key of, and access to, the sets of rooms, for the purpose of a general superintendence, and as the servant of the occupiers respectively, by whom he is employed in some cases to look after the rooms. The lessors provide gas for the staircases, halls, and passages, and water for the entire buildings, and pay all rates and taxes, charging their tenants higher rents in consequence. The sets of rooms are let under an agreement, by which the lessors let for a certain time, at a certain rent, with a covenant by the lessors to pay the rates, and a covenant by the lessee to repair internally, and a power to the lessors to enter to paint outside and to inspect the state of the inside, with a proviso for re-entry on the non-payment of rent or breach of the other covenants. The premises being taken subject to the following regulations:—The care of each entrance and the rooms connected therewith will be in charge of a resident porter appointed by the lessors. There are duplicate keys to the outer door of each set of chambers, one of which is to be always in the hands of the porter, and the other in the care of the tenant while the rooms are in use. The tenants have the right, free of charge, to the general services of the porter—viz., he is to be constantly in attendance, to cleanse the general stairs, &c., every morning, to receive and deliver all letters and parcels, to receive the keys of the outer doors of the several sets of rooms from the tenants on their leaving at night, to attend to the regular and proper supply of coals to the several apartments. Coals are supplied by the lessors at a certain price, tenants are not allowed to have stores of coals in their rooms:—*Held*, that each set of rooms was separately occupied by its tenant, and was therefore a rateable hereditament, and ought to be separately inserted and assessed in the valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67). *THE QUEEN v.*

VOL. VII.—Q. B.

VALUATION (METROPOLIS) ACT, 1869—cont.

THE ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION - - - - 90

— Appeal - - - - 653

See APPEAL AGAINST POOR-RATE.

VOTING PAPER—Stamp - - - - 463

See STAMP.

WAIVER OF FORFEITURE—*Ejectment—Landlord and Tenant—Forfeiture for Breach of Covenant—Covenant not to permit Auction on Premises.*] In an indenture of lease, of the 23rd of March, 1860, from plaintiff to C., was a covenant by C. not to permit a sale by auction on the premises without plaintiff's consent, with a proviso for re-entry on non-payment of rent or breach of any of the covenants. On the 11th of April, 1867, C. assigned the goods on the premises by a deed of mortgage, with power to the mortgagees, in default of re-payment of the loan, to sell the goods by auction on the premises. On the 22nd of April C. mortgaged the premises by under-lease to defendant, with a proviso that C. should retain possession of the premises so long as he paid the loan by certain instalments, and was not bankrupt, and did not enter into any deed for the benefit of creditors; but that on default in payment, or any breach of the foregoing proviso, defendant might enter and take possession, &c. On the 30th of April C. executed a deed conveying all his estates and effects to trustees for the benefit of creditors. C. remained in possession of the premises; and in his absence, on the 23rd of May, the mortgagees, acting under the deed of assignment of the 11th of April, sold the goods by public auction on the premises, without plaintiff's consent. Plaintiff thereupon brought ejectment; and, on the above facts, the jury found that the sale by auction took place by permission of C.:—*Held*, that C. had power to give permission for the sale, notwithstanding his conveyance of the premises after the deed granting the power of sale; and that a forfeiture had therefore been incurred.—In ejectment by landlord under a proviso for re-entry on breach of covenants, plaintiff, under an order for particulars, gave as breaches the permitting a sale by auction on the premises without plaintiff's consent, and the non-payment of rent accrued due since the sale. Defendant obtained a judge's order staying the action as to the breach for non-payment of rent, on payment of the rent to plaintiff, or into court, if he refused it. Plaintiff refused the rent, and it was paid into court. At the trial the forfeiture by the sale by auction was proved:—*Held*, affirming the judgment of the Court of Queen's Bench, that there had been no waiver of the forfeiture. *TOLEMAN v. PORTBURY* [Ex. Ch. 344]

WARRANT—Wharfinger—Detinue - - - 594
See TITLE OF BAILEE.

WATER—Collection—Bridge - - - 550
See “NUISANCE.”

— Collection—Escape - - - 661
See DUTY OF ADJOINING OCCUPIERS.

WATER CLOSET—Escape of water - - - 661
See DUTY OF ADJOINING OCCUPIERS.

WAY, DEDICATION OF—*Highway—Right of Owner of Soil to access to his Property across a public Footpath—Highway Act* (5 & 6 Wm. 4, c.

WAY, DEDICATION OF—continued.

50), s. 72—*Metropolis Local Management Act (18 & 19 Vict. c. 120), ss. 96, 98.* The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public, and may exercise all other rights of ownership not inconsistent with such dedication; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage and another part to another, does not deprive him at common law of any rights as owner of the land which are not inconsistent with the right of passage by the public; and the provisions of the Highway and Metropolis Local Management Acts, so far as they apply to roads and streets, are subordinate to the paramount rights reserved by the owner. The respondent was owner and occupier of premises contiguous to a public highway, several feet of the highway immediately adjoining to his premises being flagged pavement, which had been used as a footway for sixty years. The respondent's premises consisted of a warehouse, yard, and railway arches, with a gateway opening on to the pavement; the site had formerly been occupied by shops and houses; but, owing to the erection of the railway, was now unfit for houses. The respondent used the premises for the deposit of heavy machinery, &c.; and he at first unloaded the machinery from the carriage or trolleys in the roadway, and moved it across the pavement by rollers and levers into his premises; but this took much time, and was objected to as causing a nuisance by the obstruction to the foot pavement. The respondent then applied to the appellants—who were the surveyors of highways under the Metropolis Local Management Act (18 & 19 Vict. c. 120), s. 96, and under s. 98 were empowered from time to time to cause the streets to be paved and the ground or soil to be raised or lowered,—for permission to take up the flags, and make a proper paved carriage access across the footway to his premises. This they refused. The respondent then conveyed his machinery across the pavement in the carriage or trolleys; and the weight crushed and injured the flags. Upon this the appellants took out a summons against the respondent under 5 & 6 Wm. 4, c. 50, s. 72, for doing damage to a highway. The magistrate dismissed the summons, "finding that the freehold premises in question could not be reasonably enjoyed without access across the existing footway, and that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare;" and he stated a case for the opinion of the Queen's Bench as to whether he was bound to convict:—*Held*, that the magistrate was justified in dismissing the summons. *ST. MARY, NEWINGTON v. JACOBS* 47

WESTMINSTER CHAMBERS—Valuation 90
See VALUATION (METROPOLIS) ACT 1869. 2.

WHARFINGER—Detinue - - - 594
See TITLE OF BAILEE.

WIFE'S SEPARATE USE—Money received 218
See MONEY RECEIVED TO USE OF HUSBAND AND WIFE.

WILFUL DAMAGE—Justices—Jurisdiction 353
See JUSTICES' JURISDICTION. 1.

WILL—Construction—Cross remainders - 116
See CROSS REMAINDERS.

WORDS—"Cause of action" - - - 573
See "CAUSE OF ACTION."

—"Fair and reasonable supposition of right"
See JUSTICES' JURISDICTION. 1. [353]

—"From the loading" - - - 702
See COMMENCEMENT OF POLICY. 2.

—"Goods at risk of seller for two months" 436
See GOODS AT RISK OF SELLER.

—"Government clerk" - - - 700
See AFFIDAVIT WITH BILL OF SALE. 2.

—"House now in occupation of P." - 748
See HOUSE.

—"Insurance clerk" - - - 700
See AFFIDAVIT WITH BILL OF SALE. 2.

—"Necessary expense to command rent" 64
See "NECESSARY EXPENSE TO COMMAND RENT."

—"New street" - - - 183
See "NEW STREET."

—"Nuisance" - - - 530
See "NUISANCE."

—"Occupier" - - - 418
See "OWNER." 3.

—"Own dwelling-place or shop" - 690
See MARKET.

—"Owner" - - - 418
See "OWNER." 3.

—"Rateable hereditaments" - - 90
See VALUATION (METROPOLIS) ACT 1869.

—"Resident" - - - 471
See "RESIDENT."

—"Right, power, or privilege" - - 690
See MARKET.

—"Sides of carriage or cart-way" - 69
See ENCROACHMENT.

—"Steamship" - - - 566
See "STEAMSHIP."

—"Taxed cart" - - - 285
See "TAXED CART."

—"To commence at and from loading at or above" - - - 580
See COMMENCEMENT OF POLICY. 1.

—"Voting paper" - - - 463
See STAMP.

WRIT—Service—Foreign corporation - 293
See FOREIGN CORPORATION.

WRIT FOR SERVICE ABROAD—"Cause of action" - - - 573
See "CAUSE OF ACTION."

YEW TREE—Clippings—Negligence - 31
See DUTY OF LANDOWNER.

END OF VOL. VII.

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